

GOVERNOR
Bill Richardson



STATE OF NEW MEXICO
DEPARTMENT OF GAME & FISH

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TO THE COMMISSION
Bruce C. Thompson

March 5, 2004

Field Supervisor
U.S. Fish and Wildlife Service
2321 W. Royal palm Road, Suite 103
Phoenix, AZ 85021-4951

RE: WIFL Comments

Dear Sir/Madam:

This responds to your notice of 12 January 2004, requesting the Department's comments on your "Notification of intent to prepare an environmental assessment for anticipated proposal of critical habitat for the southwestern willow flycatcher." We understand that the U.S. Fish and Wildlife Service has been ordered to re-designate critical habitat, and is using this process to obtain information for determining essential locations for the flycatcher. Below we provide a summary of specific geographic areas in New Mexico believed to be important for the conservation of the flycatcher and also why some previously identified areas are not believed essential.

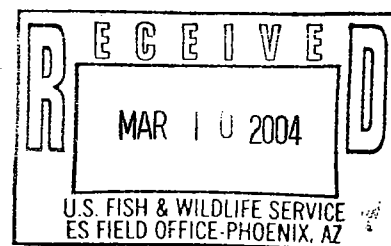
New Mexico's Wildlife Conservation Act, which provides the framework for the state's participation in endangered species recovery, does not contain language similar to the "critical habitat" designation of the federal Endangered Species Act. However, in managing endangered species, the Department does identify areas of habitat believed to be important for the conservation of a species. Several river reaches have been identified as essential for southwestern willow flycatchers in New Mexico, as follows:

Chama River from the vicinity of Chama downstream to El Vado Reservoir: Two occupied sites, in the vicinity of Las Ojos/Parkview, form the core of this area, which has good potential for habitat development and future occupancy beyond known sites.

Rio Grande del Rancho in Taos County, from confluence of Sarco Canyon downstream to confluence of Arroyo Miranda: The occupied Tierra Azul site forms the core for this reach.

Rio Grande from Taos Canyon (the Taos Junction bridge) downstream to the Otowi Bridge below Espanola: Several historic and recently occupied sites are here, with a large core site at San Juan Pueblo and smaller sites and/or good potential both upstream and downstream from there.

Rio Grande from vicinity of Isleta (I-25 bridge) downstream to Elephant Butte Reservoir: Perhaps the most important reach in the Rio Grande Valley, with several occupied sites including large sites in the vicinities of Isleta, La Joya, Sevilleta N.W.R., and San Marcial. Good potential for continued habitat development (including on federal and state refuges) and subsequent flycatcher dispersal and occupancy.



L036

L03

Rio Grande from Elephant Butte Dam downstream to the Texas line: Two currently occupied sites (Radium Springs, Selden Canyon) form the core of this reach, which historically hosted nesting flycatchers south to the vicinity of El Paso and which has potential for riparian restoration projects through proactive partnerships.

Coyote Creek at Coyote Creek State Park in Mora County: A small but important occupied site.

Bluewater Creek from headwaters in Zuni Mountains in Cibola County downstream to vicinity of Bluewater Lake: Reach contains one recently occupied site, and potential for habitat development, particularly on federal lands.

Rio Nutria from Nutria Diversion Dam downstream to confluence with the Zuni River: One currently occupied site, with potential for expansion.

Zuni River from confluence with Rio Nutria downstream to Arizona line: One currently occupied site, with potential for expansion. LD 10

San Francisco River from Arizona line downstream to confluence with Centerfire Creek: This reach is adjacent to occupied sites near Alpine, Arizona, is similar in habitat, and is likely to receive dispersing flycatchers from there. Reaches of the San Francisco River for some distance above and below Reserve traverse generally narrow canyons that lack characteristics of flycatcher habitat and lack historic and recent records of summering flycatchers, and are not considered essential for the flycatcher.

San Francisco River from confluence of Deep Creek (just upstream from U.S. 180 bridge) downstream to San Francisco Hot Springs: Only one recently occupied site, near Alma, but historically hosted breeding flycatchers in Glenwood and Pleasanton valleys. Area has good potential for habitat restoration and recolonization, including lower reaches of tributaries such as Whitewater Creek.

Tularosa River in Catron County from confluence of Apache Creek downstream to Cruzville: This small reach contains developing habitat that may prove suitable for flycatchers. Other reaches of the Tularosa River appear to have low potential, and lack historic and recent records.

Gila River from confluence of Mogollon Creek downstream to the Arizona line: This reach contains vitally important flycatcher sites in the Cliff-Gila Valley, the Redrock Valley, and above, in, and below the Gila Lower Box, with excellent prospects for continued habitat development and flycatcher dispersal. Gila River areas upstream from Mogollon Creek, including the West, Middle, and East forks of the Gila, lack historic and recent records of summering flycatchers, and are not considered essential for conservation of the taxon. LD 12

Thank you for the opportunity to comment on important habitat for the southwestern willow flycatcher in New Mexico.

Sincerely,



Lisa Kirkpatrick, Chief
Conservation Services Division



DEPARTMENT OF AGRICULTURE
STATE OF NEW MEXICO

MSC 3189, Box 30005
 Las Cruces, New Mexico 88003-8005
 Telephone: (505) 646-3007

BILL RICHARDSON
Governor

I. MILEY GONZALEZ, Ph.D.
Secretary

March 5, 2004

U. S. Fish and Wildlife Service
 Southwestern Willow Flycatcher Coordinator
 Arizona Ecological Services Field Office
 2321 W. Royal Palm Road, Suite 103
 Phoenix, Arizona 85021

Dear Sir or Madam:

New Mexico Department of Agriculture (NMDA) has given careful consideration to the court ordered designation for critical habitat for the southwestern willow flycatcher (*Empidonax traillii* extimus). U.S. Fish and Wildlife Service (FWS) also provided other information at the scoping session in Silver City on January 27, 2004. NMDA finds no information warranting changes to the existing designation. CH9

Maps furnished at the scoping meeting show a broad expansion of proposed critical habitat along the Rio Grande and Gila River. It is not prudent to expand critical habitat to any area that contains no nest sites and where habitat cannot be easily grown. It is prudent to concentrate habitat improvement funds and protection measures to a few highly productive sites where traditional populations exist in large enough quantity to ensure breeding success. LO 31

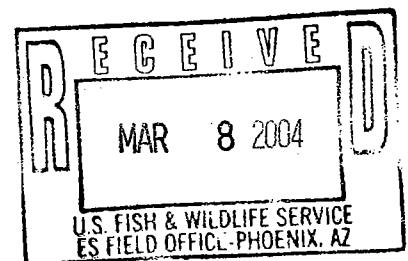
Designation of additional critical habitat has been used by environmental organizations to force removal of livestock from critical habitat as has happened in the past with spotted owl, spikedeace minnow, northern goshawk, and other species. Because this approach may cause economic harm to rural agricultural producers, NMDA requests the FWS produce a detailed economic evaluation that thoroughly analyzes this issue. E17

NMDA does not support expansion of critical habitat for the southwestern willow flycatcher.

Sincerely,

I. Miley Gonzalez, Ph.D.

IMG/jm/ws



Subject: Comments on Proposed Critical Habitat for Southwestern Willow Flycatcher

Phoenix Ecological Services Field Office:

when designating critical habitat
The Albuquerque Area Office of the Bureau of Reclamation is requesting and extension of time to submit comments on the proposed designation of critical habitat for the Southwestern Willow Flycatcher (flycatchers). Our office has substantial flycatcher survey and monitoring data on flycatchers along the Middle Rio Grande in New Mexico and would like to provide that information to your office for consideration in the critical habitat designation process.] PL39
] PL4 ALE

*BOR as
Coop agency
only 1 of several
regions invited*
In addition, I met with Debra Bills informally on Feb 26, 2004 in your office to discuss the Fish and Wildlife Service's letter dated January 28, 2004 requesting agency interest in serving as a cooperating agency. I expressed that the flycatcher occurs in several of Reclamation's Regions and that only one Region was sent the letter. It is our understanding that the letter went to Reclamation's Lower Colorado Regional Office; however, the Upper Colorado Regional Office (of which Albuquerque is under) did not received the same request. Therefore, Reclamation is only now coordinating internally to determine its level of involvement.] PP

We appreciate your consideration of this request and expect to get comments regarding our flycatcher data to you by mid-March. Additionally, we hope to provide a response to the question of serving as a cooperating agency within this same time frame. Please contact me or Rob Doster (Albuquerque Area Office Flycatcher Coordinator at 505-462-3643) in response to this request.

Art Coykendall
Endangered Species Coordinator
U.S. Bureau of Reclamation
Albuquerque Area Office
555 Broadway NE, Suite 100
Albuquerque, NM 87102

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acoykendall@uc.usbr.gov

G-011
R4

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COLORADO RIVER COMMISSION
OF NEVADA

March 8, 2004

Mr. Steve Spangle, Field Supervisor
Arizona Ecological Services Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

RE: Scoping for Southwestern Willow Flycatcher Critical Habitat Proposal

Dear Mr. Spangle:

The Colorado River Commission of Nevada (CRC-NV) wishes to express the concerns of our agency regarding the proposed designation of critical habitat for the Southwestern Willow Flycatcher, scheduled for September of this year. Our concerns center on possible designation of critical habitat along the Nevada and Arizona shores of Lake Mead, specifically within the full pool area of Lake Mead including the Colorado, Virgin, and Muddy River inflows.

It is our opinion that these zones of Lake Mead, especially the inflow delta regions, should *not* be included in any proposed critical habitat designation for willow flycatcher. Designating critical habitat in the delta regions would result in prolonged and costly threatened and endangered species evaluations, specifically pertaining to the willow flycatcher during normal operations of Lake Mead. As a result, unnecessary Section 7 consultations associated with these normal operations, potentially affecting critical habitat, may result. The following information is provided in support of this opinion.

Environmental Aspects

- The Lake Mead delta habitats (i.e., Colorado, Virgin, and Muddy rivers) are artificial features created by the construction of Hoover Dam in the 1930's; therefore, they are not historic habitats of the willow flycatcher and should not be considered critical to their continued existence.
- Designating critical habitat within high water zones of the reservoir can only result in the inundation or desiccation of primary constituent habitat elements concurrent with wet and dry hydrologic cycles.

555 E. Washington Avenue, Suite 3100, Las Vegas, Nevada 89101-1065

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<http://www.crc.nv.gov>



20m

- Although willow flycatchers show high site fidelity to nesting habitat, this species is also a floodplain nester and responds to these ephemeral habitats by seeking new, available habitat year-to-year when previously used sites are not available. LX9

Historic Judicial/Legal Proceedings

- The U.S. Congress authorized the dam and reservoir under the Boulder Canyon Project Act and actions which may hinder or interrupt the defined purposes (i.e., water storage), violates this act. LD 65
- The May 1997 decision by the District Court (Southwest Center for Biological Diversity vs. U.S. Bureau of Reclamation) allowed the reservoir to be filled and thereby inundate, existing willow flycatcher nesting habitat. Expert testimony provided to the court stated that the loss of trees in the delta would not represent an irretrievable loss of potential willow flycatcher production for 1997 and no irreversible loss of future habitat options.
- The 1997 District Court decision was upheld by the Ninth Circuit Court of Appeals (Southwest Center for Biological Diversity vs. U.S. Bureau of Reclamation) in 1998. In doing so, the Circuit Court determined that the Secretary's decision to adopt the biological opinion, the reasonable and prudent alternatives (RPA), and the incidental take statement was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. The Secretary had, in fact, adopted a final RPA that complied with the jeopardy standard that could be implemented. Jeopardy to the willow flycatcher was avoided with filling of the reservoir. LO 4

Current and Alternative Habitat Protection

- The Lower Colorado River Multi-species Conservation Plan and the U.S. Bureau of Reclamation are in the process of providing requisite habitat for the willow flycatcher at multiple locations along the Colorado River. This action obviates the necessity to include vegetation communities within the high water zone of the Lake Mead delta regions to full pool elevation within proposed designated critical habitat. PR 23

Please consider the above information during preparation of the environmental assessment pursuant to the National Environmental Policy Act (NEPA), and the alternatives that will be analyzed.

In summary, the CRC-NV believes designating critical habitat in the Lake Mead delta region to full pool elevation would adversely affect normal operations and the mandated purposes of Hoover Dam and Lake Mead. This action would further result in unnecessary consultations under the Endangered Species Act. LO 4

Mr. Steve Spangle
U.S. Fish and Wildlife Service

March 8, 2004
Page 3

Thank you for the opportunity to provide comments during the NEPA scoping process. Please contact Phil Lehr at (702) 486-2669 should you have any questions or need additional information.

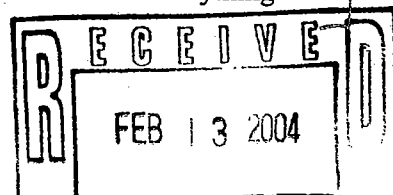
Sincerely,

A handwritten signature in cursive script, appearing to read "G. M. Caan".

George Caan
Executive Director

As the Division Engineer for the Colorado Division of Water Resources and the Colorado Engineer Adviser to the Rio Grande Compact Commission, I have four main concerns about the designation of Critical Habitat for the Southwestern Willow Flycatcher as part of the NEPA Public Scoping. First, I appreciate the opportunity to comment at the public meeting in Alamosa on January 29, 2004. I thought the meeting was well attended and provided the USFWS and its contractors a very good insight into the issues in the upper part of the Rio Grande Basin. Unfortunately, the meeting was too short to cover all the topics that the USFWS must consider.

1. The Rio Grande Compact is a formal interstate agreement between the States of Colorado, New Mexico, and Texas. The Compact is a contract among the three States, a statute of each State, and a Federal law. The Compact dictates and determines the amount of water that must pass from one state to the next on the Rio Grande. This Compact was agreed to in the late 1930's and was ratified by all three states and the United States Congress in 1939. The amount of obligation is dependent upon the amount of water available in the system in any given calendar year. The required delivery schedules are outlined in the Compact. No State, nor the United States, can unilaterally change any of the terms or requirements of the Compact. The whole premise of the Compact is that the river channels between the San Luis Valley, Colorado and El Paso, Texas will continue to be effective in their ability to carry water throughout this reach. If the Designation of Critical Habitat interferes with efforts to keep this reach free flowing and without major obstructions, then it could severely impact the upper basin States' ability to deliver the legally required water downstream and further interfere with the ability deliver water to those who hold valid property rights to the water in those States. If the channel is allowed to deteriorate because of the restrictions under the ESA or the Critical Habitat designation, then Colorado and New Mexico would have great difficulty in meeting their obligation as required by the Compact, subjecting them to litigation from the downstream States. This would destroy the interstate comity that the Compact created and continues to maintain, and would subject the States to great financial liability as well as loss of water supply for the water right holders. The HCP that is being formulated would be a much better tool to protect the Flycatcher habitat and should be considered as the first and only alternative. The number of birds and territories in the upper reach of the basin already exceeds the target. Therefore, Critical Habitat designation should not occur in this area. Much of the existing Flycatcher Habitat is on the USFWS refuges and the remainder on private land. Much of the habitat is there because of the existing diversions from the river on both public and private land and, therefore, nothing should be proposed that would restrict current or future water rights administration. If the Habitat designation is not allowed to be worked with to accomplish all the purposes of the river, there may be extremely harsh economic and other effects on the States. For example, the USBR is proposing leaving a large hole in the low flow conveyance channel near San Marcial, NM. This hole will cause incredible losses to the river and create a situation that may drive the State of New Mexico into a debit status under the Compact. This would subject the New Mexico to huge litigation expenses and an enormous potential judgment awarded against it, with no possible remedy or defense. W2
 2. The health and human safety issues surrounding the designation in the San Luis Valley are very important. West Nile Virus has killed dozens of people and unnumbered horses in Colorado this past year. Mosquitoes that are actively controlled in the State, and particularly in the San Luis Valley, spread the Virus. The prevention of this disease by killing the mosquitoes should not be restricted in any way by Critical Habitat designation and treatment of the riparian areas to suppress the Virus should proceed. PR19
 3. Much of the Flycatcher Habitat is on private land and is used for farming and ranching purposes. Most of these are small family operations that should not be impacted by this potential Habitat designation. The fact that the Flycatcher is doing well in the San Luis Valley is proof that these type of activities do not adversely impact the bird and, therefore, there is no need for anything more than an HCP to protect the Flycatcher within Colorado. E22
- HS3
PR10
LO103



4. None of these issues have been explored in the Economic Analysis that I am aware of, as no one has contacted people in the San Luis Valley to ascertain the economic or other impacts of the above mentioned issues.

222

Thomas E. Vandenberg

Please check the box that applies:

- ☐ I have no further interest in this planning process and *do not* want to receive further mailings.
- ☐ Please send all information and updates by regular mail.
- ☒ I would like to be notified and/or sent new information by e-mail when updates are available, but reserve the right to request hard copies of information.

Your Contact Information:

Your Name STEVEN E. VANDIVER
Organization Colorado Division of Water Resources
Address P.O. Box 269
City/State/Zip ALAMOSA, CO 81101
E-mail address STEVE.VANDIVER@STATE.CO.US
Phone Number 719-589-6683

Critical Habitat Proposal

Contact Information:

For further information regarding the anticipated Critical Habitat Proposal contact: Field Supervisor, Arizona Ecological Services Field Office, at (602) 242-0210; or by e-mail request WIFLcomments@fws.gov.

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[Field Supervisor, Arizona Ecological Services Field Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, Arizona 85021.]

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The Southwestern Willow Flycatcher Critical Habitat Designation NEPA Public Scoping



Southwestern Willow Flycatcher
Critical Habitat Designation

NEPA PUBLIC SCOPING

*You are invited to contribute information
and identify your concerns about the
proposed critical habitats for the
Southwestern Willow Flycatcher.*



KENNY C. GUINN
Governor

STATE OF NEVADA
DEPARTMENT OF WILDLIFE

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G-013
R4
TERRY R. CRAWFORTH
Director

GENE WELLER
Deputy Director

March 1, 2004

Steve Spangle, Field Supervisor
Arizona Ecological Services Office
U.S. Fish and Wildlife Service
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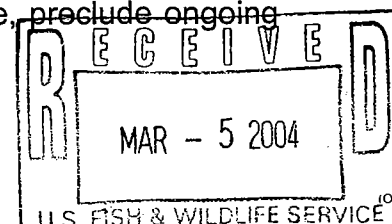
RE: Recommendations for Consideration in the Draft Environmental Assessment Concerning Southwestern Willow Flycatcher Critical Habitat in Southern Nevada.

LO 31

Dear Mr. Spangle:

This letter is in response to your request for recommendations on areas in southern Nevada for possible designation as critical habitat (re-designation) for the Southwestern willow flycatcher (*Empidonax traillii extimus*). We previously sent recommendations in June of 2002 and this response is to update that letter. The Nevada Department of Wildlife (Department) has conducted surveys for the flycatcher at various sites in southern Nevada from 1996 thru 2003. Reports of these surveys have been provided to your office and additional copies are available upon request. Based on these surveys and other monitoring efforts, the Department would like to provide recommendations for areas that *may or may not* warrant designation as critical habitat. For those areas that the Department believes warrant designation, we base the recommendations on biological and physical features that are essential to the conservation of the species and therefore meet the standard for critical habitat as defined in the Endangered Species Act of 1973 as amended (ESA), Section 3(5)(A)(i) and (5)(A)(ii).

The Department recognizes that some areas recommended as critical habitat are in need of additional conservation efforts other than critical habitat designation and may require special management considerations or protection immediately and into the future to optimize their potential for this species. The Department also recognizes some areas in southern Nevada with physical features essential to the conservation of the flycatcher are *not* the typical riparian habitat characteristic of large streams or rivers and rather these areas are small isolated spring systems. Hence, the Department recommends the U.S. Fish and Wildlife Service *not* use a 'broad brush' approach in southern Nevada to designating critical habitat. This approach could for example, preclude ongoing



conservation efforts and negotiations in areas on private lands between these isolated spring systems.

The Department recommends that critical habitat in southern Nevada include the extreme Lower Virgin River from Mesquite (T13S R71E Section 15 MDM), south to the Virgin River Delta at Lake Mead (T16S R68E Section 25 MDM). This includes approximately 30 miles of the river in Nevada (see attached map). This portion of the river has the essential biological and physical features for conservation of the flycatcher. Currently there are breeding populations of flycatchers in distinct areas throughout this reach of the Virgin River (McKernan and Braden 2000). Because of the complex and variable nature of the river channel and associated riparian ecosystem along the lower Virgin River, the use of the 100-year floodplain rather than a specific corridor width to designate critical habitat is more appropriate in areas downstream of the Riverside (Nevada SR170) Bridge where there is a wider floodplain, better habitat conditions and less potential for conflict with private lands ownership. The Department recognizes private land contributions to riparian habitats north of the Riverside Bridge and would not like to see critical habitat designation impair those contributions. The Department does have specific concerns with areas along the Virgin River that maintain flycatcher populations that are affected by trespass cattle and potential water diversions. Although critical habitat may provide an additional tool to limit impacts to key habitats, we recognize that resolution of these concerns will depend on many factors and may be largely independent of that designation. LD 33

The Department does *not* recommend critical habitat designation for the entire Muddy River in Clark County from the headwaters at Warm Springs (T14S R65E Section 15 and 16 MDM) south to the Muddy River Delta (T16S R68E Section 29 MDM). The Department has found only a pair of nesting flycatchers at Warm Springs during surveys in 2003, yet no flycatchers in 2000, 2001 or 2002. The remainder of the Muddy River south of Warm Springs to the Muddy River delta is confined to a channel with limited riparian value and therefore does not meet the criteria as essential for the flycatcher. Finally, although a small population of flycatchers does occur at the Overton State Wildlife Management Area near the Muddy River Delta, the Department believes this area is *not* essential for the long-term conservation of the flycatcher as defined in ESA. Further, existing consultation processes will provide adequate protection for individual birds and habitat, and the Department is firmly committed to incorporating flycatcher needs into the management strategies and prescriptions for this property. LD 14

Meadow Valley Wash extends from the Caliente area in Lincoln County (T4S R57E Section 7 MDM) south to just south of the Lincoln County line into Clark County (T13S R66E Section 7 MDM). Clover Creek extends from immediately east of Caliente to approximately Islen (T5S R69E Section 7 MDM). We do *not* recommend critical habitat be designated for the aforementioned

areas. Although, Meadow Valley Wash and Clover Creek do have some riparian habitat elements conducive to flycatchers, much of the riparian area is narrow, subject to frequent scouring, and less than the essential 10 m wide for flycatchers (Finch et al. 2000). Again, existing consultation processes, the Eastern Lincoln County MSHCP currently under development, and the pending implementation of Safe Harbor agreements with private landowners will provide adequate protection for individual birds and limited habitats on public and private lands.

Beaver Dam State Park (T5S R71E Section 17 MDM) is located in extreme eastern Lincoln County on the Utah state line, incorporating the short Nevada reach of upper Beaver Dam Wash. The Department does *not* recommend critical habitat designation for this area. No flycatchers were located at Beaver Dam State Park during surveys in 1999 and 2000. This area is actually within the Great Basin and on the extreme northern range of *E. t. extimus*. As well, the Department of Wildlife is working with the Division of State Parks to maintain riparian habitats at Beaver Dam. LD 14

The Department recommends critical habitat designations for *distinct sections* of Pahrnagat Valley in southwest Lincoln County. One of these areas is the northern portion of Pahrnagat National Wildlife Refuge (T7S R61E Section 27, and T8S R61E Section 2 and 3 MDM). This portion of the refuge contains essential biological and physical features for conservation of the flycatcher (see attached map). A substantial population of flycatchers occurs in the aforementioned areas of the refuge (McKernan et. al. 1998, 1999, 2000, 2001) and that population may be of regional importance for conservation of the species. The location of key flycatcher habitats on National Wildlife Refuge lands already affords them some level of protection and critical habitat designation will provide additional incentive for their long-term conservation and management. LD 14

We also recommend designating the upper portion of Key Pittman State Wildlife Management Area (WMA) (T4S R60E Section 26 MDM) on the western edge of Nesbitt Lake in the northern portion of Pahrnagat Valley (see the attached map). Occupied flycatcher habitat on the WMA, although of less importance to overall species conservation than habitats on Pahrnagat NWR, is nonetheless an important component to management of the flycatcher in Pahrnagat Valley. This designation is recommended conditional on *prior* development and approval of a Safe Harbor Agreement for the area. A Safe Harbor Agreement would provide assurance that the established baseline population of flycatchers will be conserved, and would be an incentive to implement additional actions beneficial to the flycatcher on the WMA while retaining necessary management flexibility for the variety of wildlife purposes for which the WMA was established. LD 15

Flycatcher populations do occur on some private lands in Pahrnagat Valley south of Key Pittman WMA to the Pahrnagat National Wildlife Refuge LD 16

(NDOW 2000, 2001, 2002). The Department does *not* recommend designating these areas as critical habitat. Protections provided from critical habitat designation on these lands would be limited, because of their private ownership and few opportunities for any nexus with Federal actions triggering consultations. We believe strongly that designation of critical habitat on these private lands could severely restrict or curtail ongoing planning efforts for management of the flycatcher and other protected and ESA listed species with private landowners, and as well possibly increase direct threats to individual birds and existing occupied and unoccupied suitable or potential habitat. Under provisions of ESA Section 4(b)(2), the Secretary may exclude any area(s) from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area(s) as part of critical habitat. The Department is currently pursuing other strategies within this area to encourage conservation for the flycatcher and its habitat on private lands and by private landowners, including but not limited to Conservation Easements, Private Land Conservation Agreements and Safe Harbor Agreements. Designation of critical habitat on private lands within Pahrangat Valley would severely compromise those ongoing efforts without providing a viable alternate strategy for conserving the flycatcher and other imperiled native species, and their habitats.

The Department does *not* recommend critical habitat designation within the Oasis Valley area of Nye County comprising the upper Amargosa River drainage basin from Springdale, Nevada (T10S R47E Section 31 MDM) to the Amargosa River narrows immediately south of the town of Beatty (T12S R47E Section 7 MDM). Based on our recent survey efforts this area does not support breeding pairs and may represent the extreme northwest range of *E. t. extimus*. Some opportunities exist to work with private landowners to enhance limited potential flycatcher habitat individually and through existing conservation agreements, but the Oasis Valley does not meet the basic ESA standard as an area which is essential to the conservation of the species.

Finally, we are unsure if Ash Meadows National Wildlife Refuge meets the essential criteria for designation of critical habitat. There are isolated pockets of flycatchers on the refuge lands and there is considerable riparian habitat in the area that nominally appears suitable for flycatchers (NDOW 2000, 2001, 2002, 2003). However, much of that riparian habitat is unoccupied by flycatchers for reasons which are not entirely clear, and the potential for lands within Ash Meadows NWR to make a meaningful contribution to species conservation needs further evaluation and assessment.

The Service has also requested comment on modified critical habitat criteria which would incorporate the 100-year floodplain as a general designation of critical habitat width rather than a measured distance perimeter around habitat patches, in order to better capture the dynamic nature of riparian areas. As indicated above, we would be supportive of this type of designation along the lower Virgin River, specifically in areas below the Riverside (SR 170) Bridge

L016

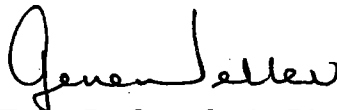
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CH28

where the river floodplain and riparian zone demonstrate a highly changeable and dynamic morphology. In other areas of southern Nevada where we have indicated that critical habitat designation may be appropriate, we would strongly recommend retention of a smaller unit of measure around suitable or potential breeding habitat patches. We believe that for these other areas, the existing standard provides an ample measure of protection while limiting unnecessary conflicts with private landowners and adjacent land use practices. In general, those riparian habitats in southern Nevada outside of the lower Virgin River are more stable and do not exhibit the large scale of dynamic floodplain-width changeability which would justify the more robust designation criteria. CH28

The Department realizes there may be more specific information needed, including maps and other data, throughout the 12-month review process. Please feel free to contact Cris Tomlinson in our Las Vegas Office (702-486-5127 ext. 3717) if you have questions regarding our responses or for further information. Thank you for the opportunity to comment on this proposed Federal action. We look forward to working with your office and other FWS staff in the implementation of conservation efforts for the flycatcher in southern Nevada.

Sincerely,



for: Terry R. Crawford, Director

crt:JS

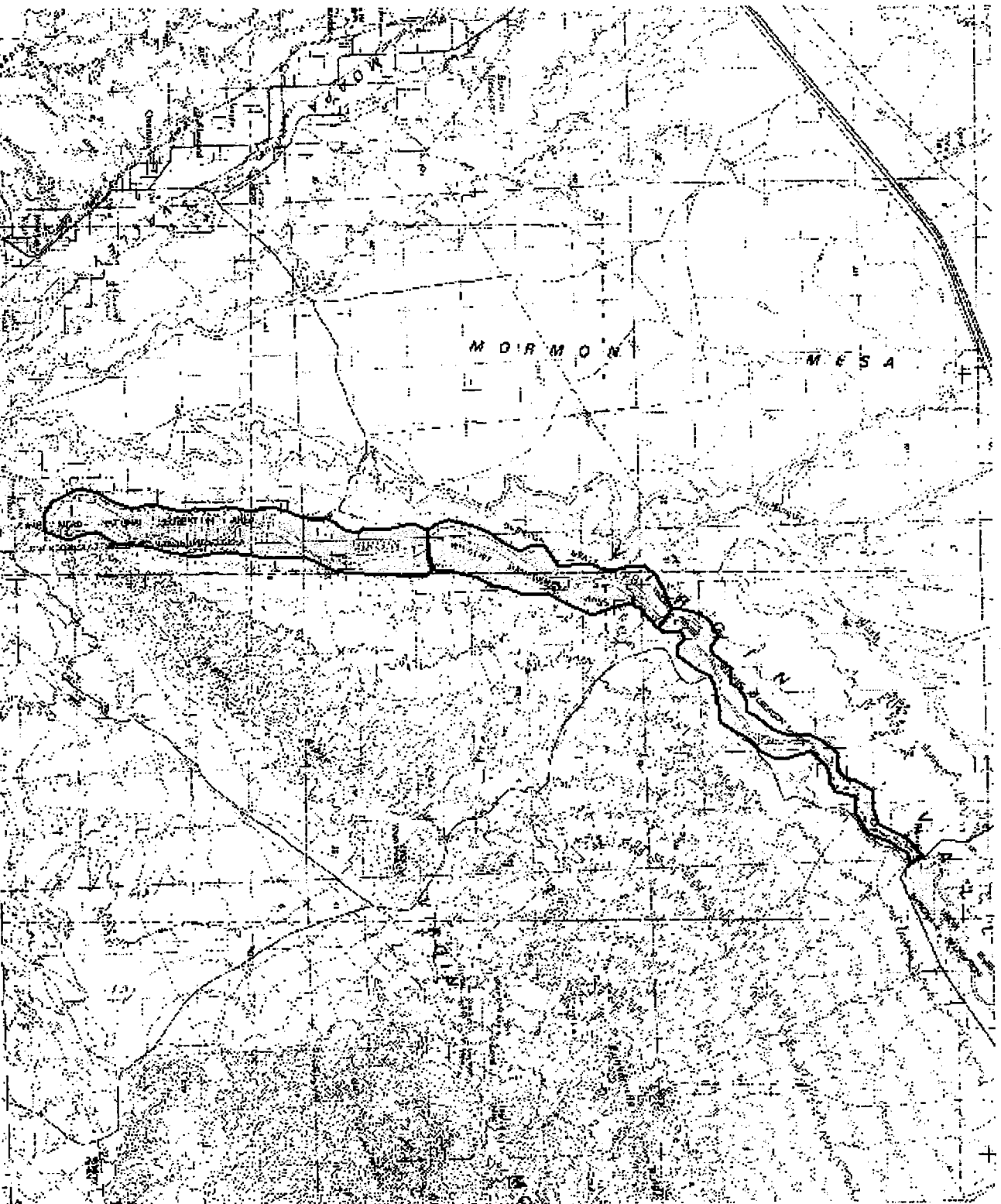
cc: U.S. Fish and Wildlife Service (attn: Cynthia Martinez and Dick Burger)
Nevada Department of Wildlife, Habitat and Diversity Bureau (attn: Laura Richards, Ron Mills, Brad Hardenbrook, and Sandy Canning)
U.S. Bureau of Reclamation (attn: John Swett)
Overton Wildlife Management Area (attn: Keith Brose)
Key Pittman Wildlife Management Area (attn: Bart Tanner)
Nevada Division of State Parks (attn: Steve Weaver)

Attachments

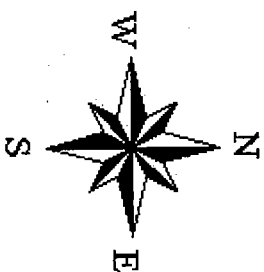
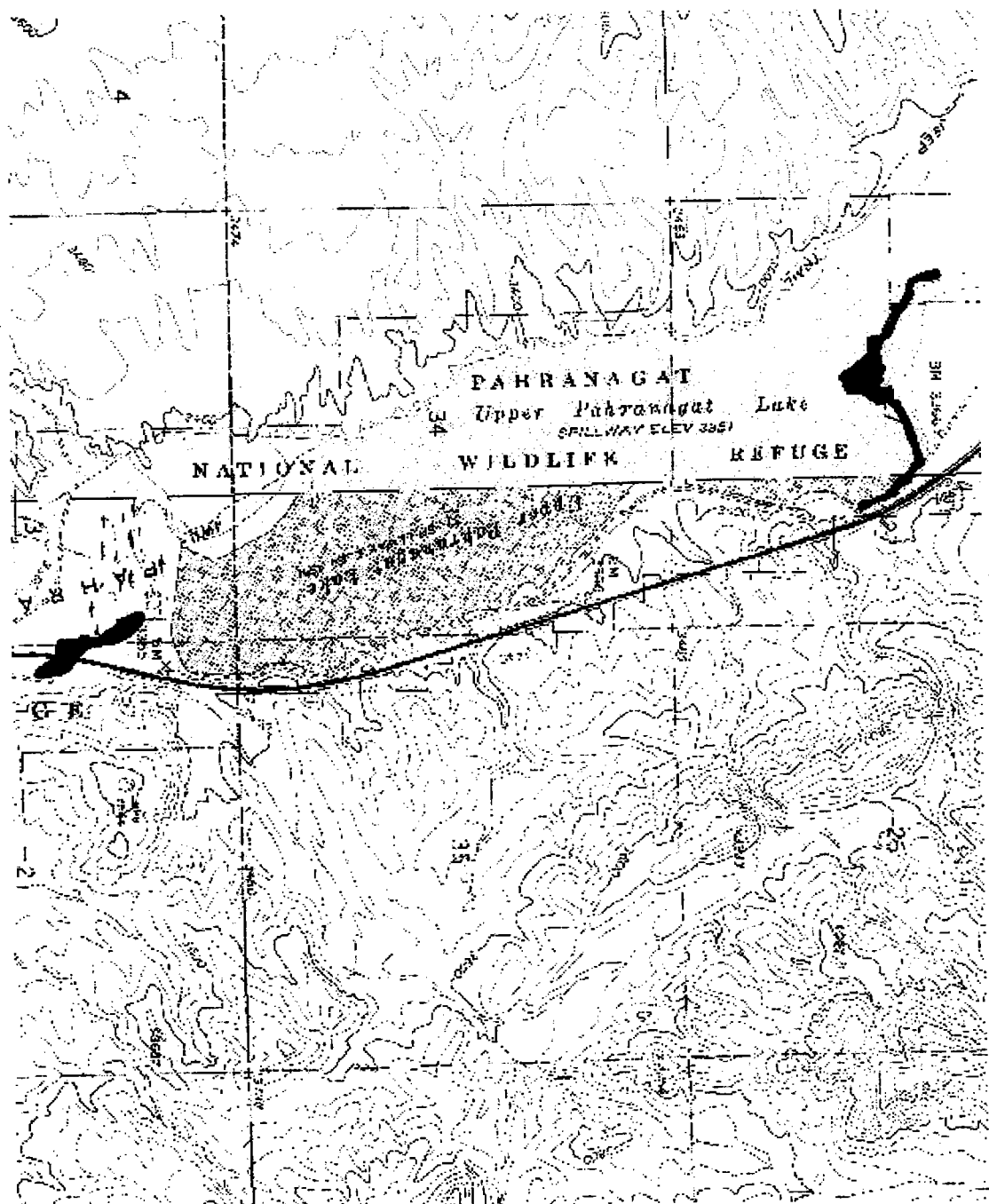
Literature Cited

- Finch, Deborah M.; Stoleson, Scott H., eds. 2000. Status, ecology, and conservation of the Southwestern Willow Flycatcher. Gen. Tech. Rep. RMRS-GTR-60. Ogden, UT: U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station. 131 p.
- McKernan, R.L. and G. Braden. 2000, 1999 and 1998. Status, distribution, and habitat affinities of the southwestern willow flycatcher along the lower Colorado River: year 3-1998, year 4-1999 and year 5-2000. San Bernardino County Museum Reports. Redlands, CA. pp-various.
- Nevada Division of Wildlife. 2000, 2001, 2002 and 2003. Breeding status of the southwestern willow flycatcher and yellow-billed cuckoo at sites in southern Nevada. Section 6 –ESA, Program Activities Reports. pp-various.

Critical Habitat Recommendation Lower Virgin River

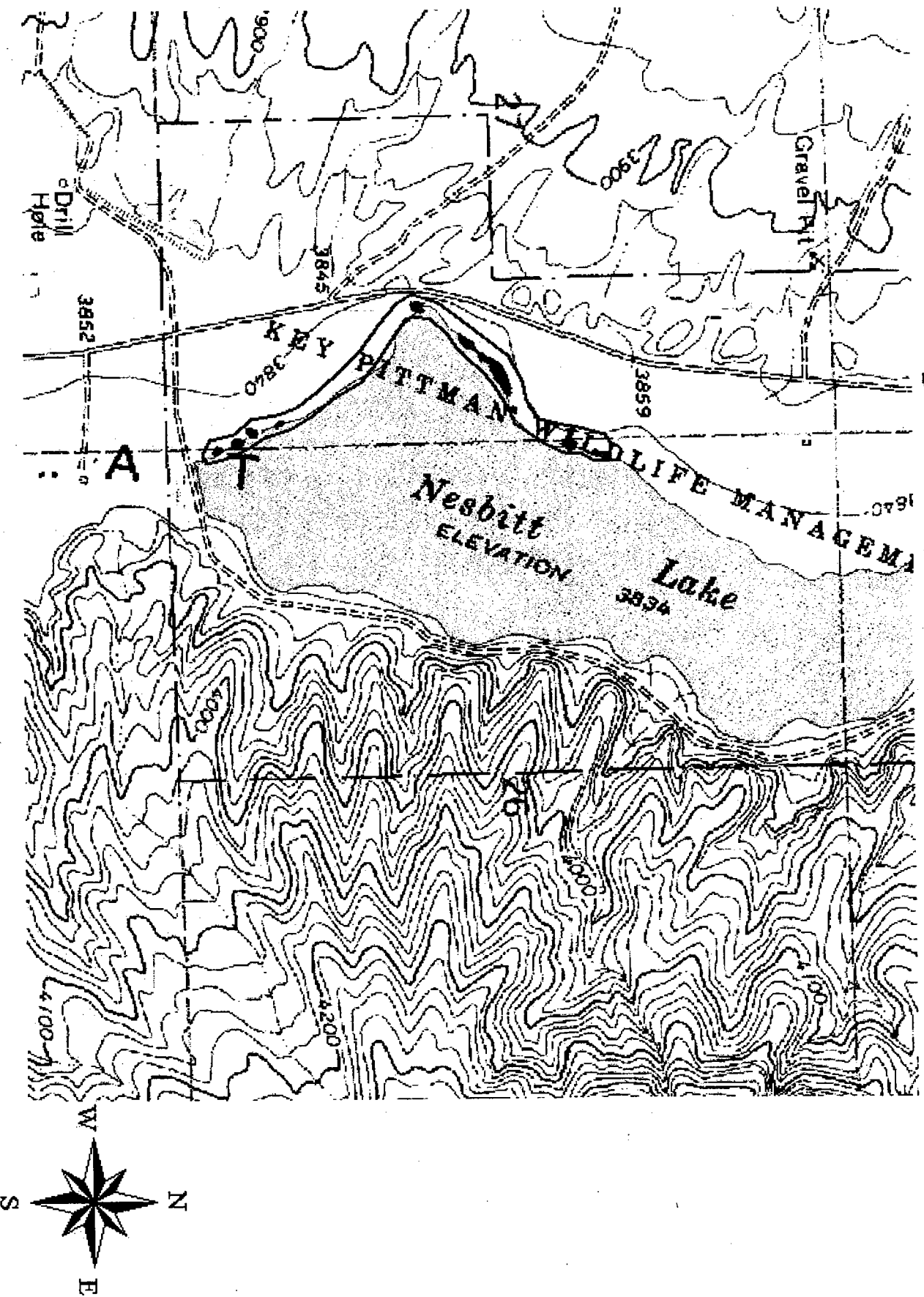


Critical Habitat Recommendations Pahranagat NWR



Critical Habitat Recommendation

Key Pittman WMA



PLANNING DEPARTMENT

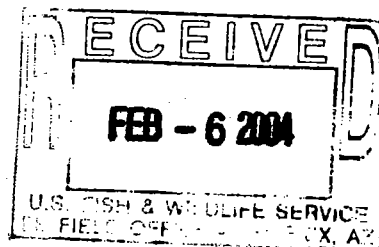
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RESOURCE MANAGEMENT AGENCY

DAVID PRICE III, RMA DIRECTOR
Community & Economic Development Department
Engineering & Survey Services Department
Environmental Health Services Department
Planning Department
Roads Department

February 3, 2004



Field Supervisor
Arizona Ecological Services Field Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

RE: Scoping Comments Concerning Designation of Critical Habitat for the Southwestern Willow Flycatcher

Dear Field Supervisor:

This correspondence is in response to the January 21, 2004 Federal Register Notice of Intent to prepare an Environmental Assessment for the proposed designation of critical habitat for the Southwestern Willow Flycatcher (SWF). The Planning Department desires to ensure that the U.S. Fish and Wildlife Service (Service) prepares a thorough and complete environmental assessment when identifying and evaluating the environmental and economic effects of designating critical habitat for the SWF. The Planning Department is especially concerned that the Service focus on the unique factors and information presented below which needs careful consideration in proposing a rule to designate critical habitat in Kern County, California.

1. *Compliance with Critical Habitat Designation Legal Process*

The Planning Department desires to ensure that the Service will fully comply with the requirements of the Administrative Procedures Act, the federal Endangered Species Act (ESA) and the National Environmental Policy Act when pursuing the new rule to designate critical habitat. It will be incumbent on the Service to 1) utilize the best scientific data currently available; 2) consider all economic impacts (both direct and indirect) resulting from critical habitat designation in Kern County; 3) identify a range of reasonable alternatives to the proposed action; and 4) provide a thorough analysis of proposed critical habitat that evaluates whether the benefits of excluding specific areas out-weigh the benefits of inclusion. The Planning Department also requests that Kern County be consulted and offered the opportunity to comment throughout the rule-making and environmental process.

2. *Incorporation of Regional Studies in the Proposal to Designate Critical Habitat*

Since 1995, the United States Army Corps of Engineers has been in formal consultation under Section 7 of ESA with the U.S. Fish and Wildlife Service on the operations of

CH 19

LO 31

February 3, 2004

Page 2

Isabella Dam and Lake. Through these consultations and other scientific reviews, extensive scientific and commercial data exists and is available that was not utilized by the Service in evaluating the original designation of critical habitat. This scientific data includes:

- A. Final Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Reservoir, California Delivery Order 0064, Environmental Services Contract No. (DACW05-95-D-0003)
Task 2. Evaluation of the 1997, 1998, 1999 Effects of Isabella Dam and Lake Operations on Riparian Vegetation along the South Fork Kern River (May, 2000).
- B. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California, (Delivery Order 0087; Environmental Services Contract No. (DACW05-98-D-0020).
Task 2. 1997-2000 Southwestern Willow Flycatcher and Least Bell's Vireo Surveys, Comprehensive Summary Report (January, 2001).
- C. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California Deliver Order 0087, Environmental Service Contact (DACW05-98-D-0020)
Task 6. Final Habitat Suitability Index Model for the Southwestern Willow Flycatcher (*Empidonax traillii extimus*) along the South Fork Kern River, Kern County, California) (February, 2001). LO 18
- D. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California Delivery Order 0028 Environmental Services Contract No. (DACW05-98-D-0020)
Task 7. Evaluation of the 1997, 1998 and 1999 Effects of Isabella Dam and Lake Operations on Herbaceous Vegetation Along the South Fork Kern River (June, 2001).
- E. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California Delivery Order 0028 Environmental Services Contract No., (DACW05-98-D-0020)
Task 8. Evaluation of the Effects of Isabella Dam and Lake Operations on Riparian Tree Growth along the South Fork Kern River (May, 2001). CH 15

A complete copy of these listed scientific reports and data have been previously submitted to you with the September 25, 2001 comment letter on the Recovery Plan from the Kern River Water Master. This scientific data regarding the SWF and associated habitat in the vicinity of Isabella Reservoir indicate that there is no scientific basis to

recommend any changes in historic operation of Isabella Reservoir. The scientific data collected since 1996 and reported to the Service, has documented that the present riparian zone located within Isabella Reservoir is thriving due to current management activities and operations, e.g., the exclusion of cattle grazing, and continued routine operation of the reservoir consistent with the current flood control criteria and existing contracts for conservation storage. The reports have documented that the periodic flooding of the riparian area in high flow years disperses and establishes a high density of new seedlings and enhances growth rates for mature trees. In fact, most SWF nest in areas where habitat did not exist prior to 1981. The scientific data indicates that habitat quantity and quality do not appear to be limiting the size or reproductive success of SWF on the South Fork. These scientific studies on current reservoir management indicate the reservoir should be eliminated from consideration as an area for designation of critical habitat. CH 386

3. *On-Going Conservation Programs Negate the Need for Critical Habitat on the South Fork of the Kern River*

The Secretary of Interior has explicit authority to exclude any area from critical habitat if the conditions warrant. 16 U.S.C. 1533(b)(2). The Service regulations on this point provide:

"The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat." 50 CFR 424.19

Due to several significant conservation efforts and land use programs occurring in the South Fork area, the benefits of excluding the South Fork as critical habitat outweigh the benefits of designation. The South Fork area is subject to management practices and land use restrictions which effectively protect the riparian habitat of the SWF. For example, the U.S. Forest Service South Fork Wildlife Area (1,200 acres), the Audubon/Nature Conservancy Kern River Preserve (1,127 acres), the State Wildlife Conservation Board purchase of the Bloomfield Ranch (1,331 acres) and the Hafenfeld Ranch Conservation Easement (92 acres) all contribute to the conservation of SWF habitat. Other property owners adjacent to the South Fork have also expressed an interest in selling their lands for conservation purposes. PR 21

In addition to these conservation efforts, the prohibition of development within the primary floodway of the South Fork of the Kern River and the non-intensive resource land use designations and zoning of the adopted Kern County General Plan and Zoning Ordinance contribute to conserving SWF habitat. Rather than adding more prohibitive regulation, the Service should direct its efforts toward coordinating with the land use management programs of Kern County, the Forest Service, the State Department of Fish and Game, and the Kern Valley Resource Conservation District and private property owner's land stewardship efforts. Critical habitat designation removes any incentive by private interests to promote beneficial conservation efforts.

4. *Restricting the Elevation of Lake Isabella Through Critical Habitat Designation Will Have Adverse Economic Effects on Kern County*

The designation of critical habitat on Lake Isabella could result in reservoir elevation restrictions which would adversely impact recreation and tourism in Lake Isabella, the Kern River and surrounding areas. Kern County farmers and agriculture would be impacted from curtailment or modification to water delivery schedules. Increased discharges could flood irrigated lands. Such discharges would result in increased siltation which would create greater maintenance burdens for the outtakes which are situated along the lower Kern River. Increased runoff may result in flooding along the lower Kern River which could adversely impact endangered species such as the San Joaquin Kit Fox and Tipton Kangaroo Rat and their habitats. Such runoffs could alter or destroy archaeological resources. More injuries and deaths are likely to occur as increased runoffs aggravate the hazards inherent in the recreational usage of the river. This would create greater burdens on the Sheriff Department's Search and Rescue Unit.

The designation of critical habitat is presumed to authorize the restriction of impoundment and diversion of Kern River water stored in Isabella Reservoir. Reducing the storage capacity of the Isabella Reservoir will cause significant environmental and socio-economic impacts throughout the Southern San Joaquin Valley portion of Kern County. The reduced available water supply will increase ground water overdraft and production costs for farmers and agricultural water districts and decrease the amount of agricultural lands which are suitable for production. Other impacts of reduced storage capacity and reduced groundwater levels are land subsidence, degradation of the quality of surface and sub-surface water supplies, changing crop patterns, and an increase in fugitive dust which worsens air pollution and contributes to airborne diseases. All of these environmental impacts need to be addressed in the environmental assessment document.

5. *Floodway Maintenance Needs of the South Fork of the Kern River*

The potential exists for extensive flood damage to private property as well as a County-maintained bridge crossing the South Fork on Sierra Way due to sediment build-up, dense vegetation and debris on the South Fork of the Kern River. The Federal Emergency Management Agency (FEMA) administers regulations which prohibit encroachments within the designated floodway that compromises the river's flood-carrying abilities. The Service has previously stated that stream channelization and other activities that alter riparian vegetation could adversely affect the SWF (Federal Register, February 27, 1995, p. 10714). Thus, critical habitat designation may affect FEMA, National Resource Conservation Service and Kern County efforts to remove vegetation and sediment necessary to restore channel capacity. The inability to undertake normal maintenance could cause the river to divert or flood other areas as well as destroy riparian vegetation that may be occupied by the SWF. These issues need to be fully addressed in the environmental assessment document.

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February 3, 2004

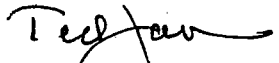
Page 5

6. *Economic Impact Assessment Methodology Must be Comprehensive in Addressing the Many Direct and Indirect Effects of Critical Habitat Designation on Kern County*
The Service is required when considering the designation of critical habitat to consider "the economic impact and any other relevant impact of specifying any particular area as critical habitat" (16 U.S.C. 1533(b)(2)). Through a Section 7 Consultation, the effects of any federal agency action on the species' recovery as well as survival will be required to be addressed. In the situation of the South Fork of the Kern River, the use of National Resource Conservation Service programs by private property owners would result in Section 7 Consultations that impose a higher standard of mitigation than would otherwise be required under Endangered Species Act listing statutes. This translates into higher mitigation costs that need to be addressed by the Service's economic analysis.

Critical habitat designation can also have a "chilling effect" on local government efforts to implement necessary public safety improvements such as bridge, road and flood control safety improvements. Some of these worthy projects may never reach a formal Section 7 Consultation, in as the Service processing delays and requirements result in abandonment of projects. These secondary economic effects should be estimated and quantified based on known Department of Interior staffing and budget short-falls. The Planning Department requests the opportunity to be consulted when the Service develops the methodology and scope of issues to be analyzed in preparing the economic impact assessment.

Please include the Kern County Planning Department and Kern River Water Master on all notification and mailing lists related to the proposed critical habitat rule-making process. The Planning Department may provide further comments prior to the close of the public scoping process.

Sincerely,


TED JAMES, AICP, Director
Kern County Planning Department

TJ:jb

i:\adm\ted\flycatcher designation.ltr

cc Board of Supervisors
County Administrative Office
County Counsel
Grand Jury
Congressman William Thomas
Congressman Calvin Dooley

Kern River Water Master
Scott Kuney, Esq.
Resource Management Agency

G-015
RL6

Daniel.J.Dykstra@spd02.usace.army.mil
Subject: ATTN: Flycatcher NEPA scoping

Dear Mr. Spangle,

Please reference our letters of February 17, 2004 and March 5, 2004. We are sending by Federal Express today copies of the following Southwestern Willow Flycatcher-related documents for your review and consideration:

1. Isabella Lake and Dam Tree Mortality Study - September 2003.
2. South Fork Kern River Riparian Vegetation Mapping (four 11x17 inch maps).
3. Southwestern Willow Flycatcher Monitoring and Removal of Brown-headed Cowbirds - SSRS final report.
4. Task 2: Summary of 1997 - 2002 Survey Results for Southwestern Willow Flycatcher and Least Bell's Vireo - J&S final report.
5. Task 3: Summary of 1997 - 2002 Survey Results for Brown-headed Cowbirds - J&S final report.

PL13

We also anticipate receiving additional scoping comments from our Sacramento District, and hope to provide them to you shortly.

Respectfully,

Wade L. Eakle, MS, CWB
Ecologist & Regulatory Program
Manager
US Army Corps of Engineers
South Pacific Division
333 Market Street
San Francisco, CA 94105

2/2



County of San Diego

WALTER F. EKARD
CHIEF ADMINISTRATIVE OFFICER
(619) 531-8226
FAX: (619) 557-4060

CHIEF ADMINISTRATIVE OFFICE

1600 PACIFIC HIGHWAY, STE. 209, SAN DIEGO, CA 92101-2472

March 8, 2004

Mr. Steve Spangle
Field Supervisor
Arizona Ecological Services Office
U.S. Fish & Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

Dear Mr. Spangle:

We are writing in response to the U.S. Fish and Wildlife Service's (Service) January 21, 2004, Notice of Scoping Meetings, and Intent to Prepare an Environmental Assessment for the Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher (Flycatcher) (*Empidonax traillii extimus*), pursuant to Section 4 of the Federal Endangered Species Acts (ESA). The County of San Diego appreciates this early opportunity to comment on the scope of the environmental analysis, including the alternatives that will be analyzed.

Among the areas under consideration by the Service are open space preserves located within the federally and state permitted San Diego County Multiple Species Conservation Program (MSCP) Subarea Plan, as well as lands subject to an ongoing regional habitat conservation planning effort for the Flycatcher in the North County MSCP Subarea Plan (North County MSCP). In light of the important issues raised by critical habitat and habitat conservation planning, we provide the following comments for consideration by the Service as it moves toward a proposed rule. Primarily, we strongly support the balancing of impacts and benefits that the Service conducted for Habitat Conservation Plans (HCPs) under section 4(b)(2), and the decision to exclude HCPs from the proposed designation. We also support the use of the definition in section 3(5)(A) to exclude HCP lands from critical habitat, and suggest that a close review of the San Diego MSCP would reveal that the preserve areas¹ covered by MSCP, do not meet the definition of critical habitat set forth in section 3(5)(A). Finally, we

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¹ For the purpose of this letter, the term "preserve areas" means all areas identified by the MSCP for protection and long-term management, and is not limited to those areas under current management and control.

strongly urge the Service to consider section 4(b)(2) exclusion for areas covered by the pending North County MSCP.] L019

The Service Correctly Weighed the Impacts and Benefits of a Critical Habitat Designation when it Exercised the Discretion Provided by Section 4(b)(2) to Exclude Areas Covered by Existing Habitat Conservation Plans and Section 10 Permits. } PR13

The ESA provides the Service broad discretion to adjust the scope of critical habitat designations to take into account the impacts and benefits of a critical habitat designation. Section 4(b)(2) of the ESA provides that the Service may exclude any area from critical habitat if, after considering the probable economic and other impacts of the designation, it is determined that "...the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [the Secretary] determines... that the failure to designate such area as critical habitat will result in the extinction of the species concerned."² The Secretary's discretion to fashion exclusions is thus limited only by the requirement that exclusions not result in species extinction. The legislative history of the 1978 amendments to the ESA makes the discretionary nature of the exclusions clear, stating that with respect to Section 4(b)(2), "the consideration and weight given to any particular impact is completely within the Secretary's discretion."³ } PR13

A sound conservation policy basis exists to exclude HCPs from critical habitat designations. For the following reasons, we believe that the benefits of excluding areas subject to HCPs far outweigh the benefits of including HCP lands in critical habitat:

- **Designation of Critical Habitat Affords No Additional Benefit to the Species.** In areas where conservation-planning efforts are underway or have been completed, lands that the Service might define through the designation of critical habitat as essential to the conservation of covered species are already being thoroughly addressed by the HCPs. It is primarily through HCPs, and not critical habitat designations, that conservation objectives can be advanced on private and other non-federal lands. Unlike section 7 consultations, HCPs incorporate management measures and protections for conservation lands designed to preserve, restore, and enhance their value as habitat. HCPs assure the long-term protection and management of covered species, and funding for management and monitoring of the species. Such assurances are generally not provided through the section 7 consultation process. Instead, the section 7 process provides for only minor changes to be made to projects that may affect listed species while HCPs require that } PR89

² 16 U.S.C. § 1533(b)(2).

³ H.R. Rep. No. 1625, 95th Cong., 2nd Sess. 17, reprinted in 1978 CODE CONG & ADMIN. NEWS 9453, 9467 (emphasis added).

impacts be minimized and mitigated to the maximum extent practicable. The section 7 process considers species' issues on a piecemeal, project-by-project basis. The conservation benefits of HCPs are further pronounced in cases where plans address species at a landscape-level, such as the San Diego MSCP.

Based on the above, the Service correctly determined that critical habitat provides little to no benefit in HCP areas. It is important to note that the Service did not rely on the notion that the regulatory definitions of "adverse modification" and "jeopardy" are the same, but instead relied on the other shortcomings of section 7's application to private and other non-federal lands. The Service's decision to accord little weight to the benefits of critical habitat during the section 4(b)(2) analysis, and the underlying basis for that decision, would therefore remain valid even in the event that the definition of "adverse modification" of critical habitat were changed.

- **Designation Would Impose Economic Burdens on HCP Participants.** The designation of critical habitat would subject HCP participants to substantial costs. There would be increased transaction costs and project delays resulting from subsequent section 7 consultations, prompted primarily by the presence of critical habitat, concerning activities covered by HCPs. Although the Service would in such cases abbreviate the consultation process given the existing coverage afforded by the HCP, additional transaction costs to the permit holders would be unavoidable. Perhaps of greater concern would be the costs associated with the defense of legal challenges to HCPs based on the Service's review standards triggered by a critical habitat designation.
- **Designation May Encourage Legal Challenges to the HCPs.** Given the uncertainty concerning the threshold requirements of "adverse modification" of critical habitat, third parties may challenge HCPs on the basis that the plans would result in adverse modification of critical habitat. Given the current uncertainty regarding the definition and application of the "adverse modification" threshold, we believe that litigation involving this issue would be a real possibility. As a result, plans that meet the stringent criteria for HCPs and support the long-term conservation of the species may be subject to legal wrangling over regulatory technicalities.
- **Designation Will Create a Disincentive to Develop HCPs.** Regional HCPs take many years to develop and require substantial investment of time and resources by local governments, private landowners, and conservation organizations. These plans likely provide the sole opportunity to implement measures to support the recovery of listed species on a broad and meaningful scale. It is abundantly clear that the Service is incapable through the Section 7 consultation process of assembling preserve areas totaling 171,000 acres, with more than 70,000

acres of coastal sage scrub, as was accomplished through the San Diego MSCP.

By imposing additional regulatory review on HCP participants, the Service will jeopardize important ongoing conservation efforts and unravel key partnerships that make these efforts possible, including those with state and local governments and other stakeholders. In effect, critical habitat designations and habitat conservation planning work at cross-purposes, with designations calling into question the value of investing in extended planning processes, developing partnerships with the Service, and marshalling stakeholder support for conservation planning. The erosion of stakeholder support for HCPs that would result from critical habitat designation and its resulting transaction costs and legal uncertainty, would spill over into ongoing efforts to develop new HCPs and forge new conservation partnerships on private and non-federal land. The exclusion of critical habitat from the boundaries of HCPs helps encourage and preserve partnerships and provide the basis for conservation actions that would be far more effective than those that the Service could achieve on its own.

LO 19

Based on the foregoing, it is clear that the adverse impacts of a critical habitat designation in areas covered by regional conservation programs would far outweigh the negligible benefits that would result from such a designation. The balancing of impacts and benefits in this instance therefore strongly favors an exclusion of areas covered by HCPs. An exclusion is warranted in this instance and would not pose any potential risk to the species, making it well within section 4(b)(2)'s requirement that HCP exclusions not result in the extinction of the species.

PR 13

San Diego MSCP Preserve Areas Do Not Meet the Definition of Critical Habitat.

Section 3(5)(A) defines critical habitat, in pertinent part, as specific areas containing physical or biological features that: 1) are essential to the conservation of the species; and 2) may require special management considerations or protection. In order to determine whether a given area requires special management considerations, therefore qualifying as critical habitat, the Service established three criteria. If a given area can meet all three of the following criteria, it is deemed to already have special management and does not qualify as critical habitat under section 3(5)(A):

LO 19

1. The plan is complete and provides a conservation benefit to the species (i.e. the plan must maintain or provide for an increase in the species' population, or the enhancement or restoration of its habitat within the area covered by the plan);

2. The plan provides assurances that the conservation management strategies and actions will be implemented (i.e., those responsible for implementing the plan are capable of accomplishing the objectives, and have an implementation schedule or adequate funding for implementing the management plan); and

3. The plan provides assurances the conservation strategies and measures will be effective (i.e., it identifies biological goals, has provisions for reporting progress, and is of a duration sufficient to implement the plan and achieve the plan's goals and objectives).

The San Diego MSCP preserve areas meet the three criteria established by the Service and therefore do not qualify as critical habitat under the definition set forth in section 3(5)(A). With respect to the Service's first criterion, the MSCP is a completed plan that underwent extensive analysis, including a formal section 7 consultation that resulted in issuance of a "no jeopardy" Biological Opinion. The HCP provides a conservation benefit to the Flycatcher, which is a covered species that benefits from specific management actions such as cowbird trapping programs. The Service recognized in approving the MSCP that the MSCP will provide for the conservation and protection of the Flycatcher and its habitat within the MSCP area in perpetuity.⁴ The Service should acknowledge in the proposed rule that 87,100 acres of MSCP preserve areas (88.54% of the County's total requirement) are already dedicated MSCP preserve areas under County management (see attachment).

With respect to the second criterion, the MSCP provides ample assurances that the conservation actions and strategies identified in the plan will be accomplished. The MSCP resulted in the signing of an Implementation Agreement between the Service and San Diego County, and in the issuance of a federal permit which legally committed the participants to enforceable terms and conditions, pursuant to section 11 of the ESA. The MSCP participants have demonstrated that adequate funding is available to implement the plan and implementation schedules have been developed and are in place.

With respect to the third criterion, the MSCP provides assurances that the conservation strategies and measures will be effective. The MSCP has provisions for annual reporting and monitoring, a comprehensive adaptive management program, and a fifty-year duration, a period sufficient to achieve the MSCP's goals and objectives.

All San Diego MSCP preserve areas have been targeted for protection and for the development of special management considerations, the long-term protection of all preserve areas is assured by the permit, and these areas should consequently be excluded from the definition of critical habitat.

⁴ Implementing Agreement for San Diego MSCP, page 12, section 9.3.

At a minimum, however, all MSCP preserve areas that are already under ownership and management should be excluded. The 87,100 acres that the County has already contributed to the MSCP preserve system are the same as the 9,725 acres contributed by individual HCPs that the Service found did not meet the definition of critical habitat. In addition to County MSCP preserve areas, MSCP preserve areas have been established by the City of San Diego and other MSCP participants. These areas, as well, do not meet the definition of critical habitat. It is incumbent on the Service to identify established preserve areas within the MSCP and exclude these areas based on the section 3(5)(A) definition. These areas do not meet the definition of critical habitat under the criteria and rationale articulated by the Service in the proposed rule.

L019

A Section 4(b)(2) Balancing of Impacts and Benefits Associated with Critical Habitat Indicates That Areas Covered by Pending HCPs Warrant Exclusion.

The reasons that form the basis for exclusion of existing HCPs under section 4(b)(2) are equally applicable to pending HCPs. In addition, there are a number of considerations unique to pending HCPs, and the North County MSCP in particular, that provide a compelling basis for exclusion under section 4(b)(2). For the following reasons, the benefits of excluding the pending North County MSCP far outweigh the benefits of critical habitat designation:

PR13

- **Critical Habitat Designation Would Increase the Economic Burden on MSCP Participants.** Notwithstanding the apparent lack of any benefit to the species as a result of a designation, critical habitat would require private landowners and public agencies that have reached the final stages of a multiple-year planning process to incur additional regulatory review that would translate into significant new costs and delays affecting the implementation of public and private projects.

The designation of Flycatcher critical habitat in areas included in the pending North County MSCP would subject the County to substantial costs prior to and after permit approval. Since the Service is proposing critical habitat for the Flycatcher, the County presumes to incur costs associated with assessing the potential effect of a designation on the pending North County MSCP. The County has also assumes the added cost of preparing comments to the service conveying the concerns expressed in this letter. Unfortunately, funding and staff resources otherwise earmarked for the preparation of the North County MSCP are being diverted to address these matters, rather than toward measures to benefit the Flycatcher.

PR89

The County is concerned about potential discrepancies between the boundaries of the proposed critical habitat designation based on general information and the North County MSCP boundaries that are based on

current site-specific information. Such discrepancies would need to be analyzed, explained and documented in the North County MSCP; an exercise that would provide no apparent benefit to the Flycatcher yet would elevate costs and delay the completion of the North County MSCP. The County would have the burden to bear the expense of providing the evidence and rationale for the habitat boundaries that may deviate from the critical habitat designation.

- **Critical Habitat Designation Will Create Disincentives to Complete the North County MSCP.** The Service has recognized in prior rulemaking that critical habitat designations present challenges to the Service's HCP program by adding uncertainty and complexity to plan development and implementation. As the Service has acknowledged, critical habitat may create a disincentive for local government and private landowner participation in the development of HCPs – an outcome directly contrary to the Service's stated policy of supporting and encouraging conservation planning efforts. In effect, critical habitat designations and habitat conservation planning seem to work at cross-purposes, with designations calling into question the value of investing in extended planning processes, developing partnerships with the Service, and obtaining stakeholder support for conservation planning.

L019

Given our investment in these planning efforts, we are concerned that a designation of the Flycatcher's critical habitat may adversely affect the development of the North County MSCP and the County's ability to realize the goals and objectives of the MSCP. We believe that the imposition of critical habitat within the North County MSCP will lead to unintended consequences that would burden the planning process and create significant uncertainties regarding the viability and outcome of the North County MSCP, without affording the Flycatcher any additional conservation benefit. From the County's perspective, we view the proposed designation as posing substantial risks to the North County MSCP in the form of added regulatory uncertainty, increased costs to plan development and implementation, weakened stakeholder support, and greater vulnerability to legal challenge.

- **Critical Habitat Designation Creates Vulnerability to Legal Challenges.** The County's concern over these issues appears to be well founded. Over the past few years, the role of critical habitat in the context of the overall framework of the ESA has come under intense legal scrutiny, creating a fluid regulatory landscape that has yet to stabilize. Of particular concern is the unresolved relationship between critical habitat and habitat conservation plans and the potential effect of designations on the Service's review and approval of the North County MSCP. We note that these issues are currently the subject of pending litigation and proposed revisions to the Service's existing regulations. The County

P1290

would incur costs associated with the defense of a legal challenge to the North County MSCP that was based on the Service's critical habitat review standards.

PR90

The circumstances surrounding the North County MSCP provide a compelling basis for exclusion of this area from the critical habitat designation. The substantial investment of resources made by the MSCP participants over the last several years should not be put at risk over a process that will afford no benefit to the species, nor should important conservation programs be potentially undermined. In light of the potentially disruptive effect of a Flycatcher's critical habitat designation on the North County MSCP planning process, as well as the lack of any apparent conservation benefit of such a designation in a region where conservation planning is underway, the Service should take all available steps necessary to buffer these planning efforts and the plans that will result from those efforts, from potential adverse consequences of such a designation. The Service has an opportunity through this rule to reward voluntary and anticipatory conservation efforts at no risk to the species.

LO19

The Service is equipped with ample authority under the ESA and associated regulations to insulate HCPs from potential conflicts created by critical habitat designations, and it has utilized this authority in other designations. The Service recently determined that the benefits of designating critical habitat in areas covered by pending HCPs was outweighed by the adverse effects, and used its authority under section 4(b)(2) to exclude those pending HCPs.⁵

PR13

We strongly support the Service's use of definitional exclusions under section 3(5)(A) and discretionary exclusions under section 4(b)(2) to exclude HCP areas from critical habitat. We further support the Service's decision to apply section 4(b)(2) exclusions to areas already excluded by the Service's interpretation of section 3(5)(A), given potential legal uncertainty regarding definitional interpretations of section 3(5)(A). The Service should recognize that critical habitat has the potential to disrupt the HCP program- the most effective conservation program under the ESA. As discussed above, the Service should appropriately balance the impacts and benefits of designating Flycatcher critical habitat in areas covered by existing HCPs. HCP lands clearly warrant exclusion from critical habitat and the Service should retain such exclusions in the final rule. In addition, the Service should exclude the pending North County MSCP. Exclusions for existing and pending HCPs will ensure sufficient incentives remain in place to sustain new HCP development and would affirm the crucial role HCPs play in the broader endangered species conservation strategies.

LO19

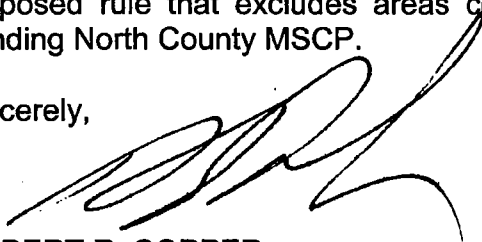
⁵ Final Critical Habitat Designation for the Preble's Meadow Jumping Mouse, 68 Fed. Reg. _____ (June 23, 2003). See also, Final Critical Habitat Designation for Blackburn's Sphinx Moth, 68 Fed. Reg. 34709 (June 10, 2003), wherein the Service excluded ranches involved in voluntary wildlife programs from the critical habitat designation because of a concern that designation would have a chilling effect on the voluntary partnerships.

Consideration should also be given to the effect that the proposal to designate critical habitat would have upon the regional transportation efforts that are ongoing in the northern portion of San Diego County. In particular, the intent to rule threatens the proposed funding for habitat and conservation associated with the improvement to State Route 76 and other regional transportation arterials that are currently included in the proposed TransNet Authorization, a potential \$100 million funding source.

E96

Thank you for considering the County's comments and is willing to share any biological information that may be helpful to the process. We look forward to a proposed rule that excludes areas covered by existing HCPs as well as the pending North County MSCP.

Sincerely,



ROBERT R. COPPER
Deputy Chief Administrative Officer
Land Use and Environment Group

RRC:pb

cc: Ms. Therese O'Rourke, U.S. Fish and Wildlife Service
Mr. Jim Bartel, U.S. Fish and Wildlife Service
Mr. Ron Rempel, California Department of Fish and Game
Ms. Gail Presley, California Department of Fish and Game
Mr. William Tippets, California Department of Fish and Game
Mr. Gary L. Pryor, Director, Department of Planning and Land Use
Ms. Renee Bahl, Director, Department of Parks and Recreation
Mr. Robert Asher, Chief, Department of Planning and Land Use
Mr. Marc Ebbin, Law Offices of Ebbin, Moser + Skaggs
Ms. Claudia Anzures, County Counsel
Ms. Karen Scarborough, Undersecretary, CA Resources Agency

COLORADO RIVER BOARD OF CALIFORNIA

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GLENDALE, CA 91203-1035

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(818) 543-4685 FAX



March 8, 2004

Mr. Steve Spangle
Field Supervisor
U.S. Fish and Wildlife Service
Arizona Ecological Services Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

Dear Mr. Spangle:

The purpose of this letter is to provide the U.S. Fish and Wildlife Service (USFWS) with the preliminary comments of the Colorado River Board of California (Board) on the request for scoping comments associated with designation of critical habitat for the southwestern willow flycatcher (WIFL). The request for comments was contained in a Federal Register notice published on January 21, 2004 (69 FR 2940-2943, January 21, 2004).

The Board appreciated the opportunity to participate in the public scoping meeting that was held in Phoenix, Arizona on January 26, 2004. The meeting and ensuing discussions were very helpful in more fully understanding the issues associated with designation of critical habitat for the WIFL within its range.

At this juncture, the Board would like to encourage the USFWS to carefully evaluate the potential economic impacts related to the designation of critical habitat within the floodplain of the major river systems within the range of the species. The Board recommends that the proposed critical habitat designation must include very explicit inclusion and/or exclusion criteria in the context of potential economic impacts. The Board requests that the USFWS clarify the proposed timeline associated with the identification of economic impacts related to critical habitat designation (i.e., is the critical habitat expected to be in place for the same period of time anticipated to achieve down-listing or de-listing and the species recovery as identified in the August 30, 2002 WIFL Recovery Plan). The Board requests that the USFWS compare and contrast the economic impacts associated with the listing of the WIFL as an endangered species versus the designation of critical habitat.

E20

The Board urges the USFWS to carefully consider the biological and ecological realities associated with the maintenance and/or re-establishment of native riparian habitats in many of the highly developed river systems in the arid Southwestern United States. For example, along the Lower Colorado River below Hoover Dam much of the historic floodplain has been functionally decoupled from the hydrology of the river itself. This is a consequence of

CH 28

Mr. Steve Spangle
March 8, 2004
Page 2

the channelization and channel incisement that has occurred since the Lower Colorado River was developed in the early 1900s. Therefore, in the context of the Lower Colorado River, much of the historic floodplain may no longer be ecologically suitable, or provide the requisite biological constituents, to warrant designation as WIFL critical habitat.

PR 9

The Board encourages the USFWS to fully consider and utilize all scientific information and data that is available in developing the critical habitat designation. For example, the Board urges the USFWS to utilize the annual WIFL habitat and species survey data collected by the U.S. Bureau of Reclamation (Reclamation) as part of its RPA activities and requirements under the current Lower Colorado River Operations and Maintenance Activities Biological Opinion. This annual survey data, collected over a number of years, has contributed significant biological and ecological information related to the habitat use characteristics of the WIFL. Additionally, similar habitat and species survey data collected by the Arizona Game and Fish Department throughout the Salt, Gila, and Verde River systems should be utilized in developing any proposed critical habitat designations. Also, the USFWS should fully describe the relationship between the designation of the proposed critical habitat and the identified recovery and management units identified in the 2002 Recovery Plan.

CH 15
CH 31
CH 32

The Board urges the USFWS to consider not designating critical habitat in areas or riverine reaches that have comprehensive species conservation programs (i.e., that include suitable measures for the WIFL), or habitat restoration programs (i.e., that address riparian habitats required by the WIFL) being developed or already in place. This would recognize the intrinsic value of large-scale multi-species conservation planning efforts in the protection of endangered species and management of native riparian habitats. For example, attempting to enhance, restore, and maintain suitable WIFL riparian habitat, in conjunction with implementation of the Lower Colorado River Multi-Species Conservation Program (LCR MSCP), could become much more difficult with the extra regulatory burden of designated WIFL critical habitat along the Lower Colorado River.

PR 17

Finally, the Board believes that the USFWS should consider the preparation of an Environmental Impact Statement (EIS); rather than relying on an environmental assessment (EA) for this proposed action. The potential scale of economic impacts related to critical habitat designation within the range of the species probably requires a more comprehensive analysis such as that provide by an EIS. Also, an EIS would provide a more detailed evaluation of the critical habitat inclusion/exclusion criteria, and the potential relationships between floodplain and riverine hydrology and the ecology and biology of the WIFL.

PR 32

In closing, the Board requests that the USFWS continue to keep the Board notified of progress in developing the critical habitat designation for the WIFL. The Board looks forward to continuing to participate in this process. Please feel free to contact me at (818)

Mr. Steve Spangle
March 8, 2004
Page 3

543-4676 if you have any questions regarding these comments, or require additional information.

Sincerely,

/s/

Gerald R. Zimmerman
Executive Director

C: Mr. Robert W. Johnson, Regional Director, USBR-LC
Ms. Laura Herbranson, USBR-LC
Mr. Sam F. Spiller, USFWS, LCR Coordinator
Mr. George Caan, Colorado River Commission of Nevada
Mr. Herbert R. Guenther, Arizona Department of Water Resources
Mr. Curt Taucher, California Department of Fish and Game



G-018 R6

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RIVERSIDE COUNTY FLOOD CONTROL
AND WATER CONSERVATION DISTRICT

March 1, 2004

Mr. Steve Spangle, Field Supervisor
Arizona Ecological Services Office
U.S. Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, AZ 85021

Dear Mr. Spangle:

Re: Southwestern Willow
Flycatcher Critical Habitat

This letter is in response to the "Notice of Scoping Meetings and Intent to Prepare an Environmental Assessment for the Proposed Designation of Critical Habitat for the Southwestern Willow Flycatcher" (Notice) published in the Federal Register by the U.S. Fish and Wildlife Service (Service) on January 21, 2004. The Riverside County and Water Conservation District (District) has reviewed the Notice and some of the accompanying documents including the Final Recovery Plan that are available at the Service's website. The District appreciates the opportunity to review and provide comments on the preparation of the draft environmental assessment and the National Environmental Policy Act (NEPA) process for the designation of critical habitat for the Southwestern Willow Flycatcher (SWF).

The District is concerned with the potential that existing flood control facilities may be included in the critical habitat designation. The District operates and maintains numerous flood control facilities that could be adversely impacted by the proposed critical habitat designation. Many of these flood control facilities such as the Santa Ana River Channel and Levees, Bautista Creek Channel and Basin, Norco Bluffs, etc. were constructed by the U.S. Army Corps of Engineers (Corps) and the District is required to comply with maintenance protocols established by the Corps and enforced by federal regulations. The SWF Final Recovery Plan specifically states that recovery efforts should be focused on the Santa Ana River and it appears that the proposed critical habitat area could extend along the Santa Ana River and its tributaries from Prado Dam to its headwaters in the San Bernardino National Forest. The District is responsible for maintaining portions of the existing Santa Ana River Levees system that extends approximately from Mount Rubidoux to about one mile upstream of the Riverside Avenue Bridge within the Cities of Riverside and Colton in the Counties of Riverside and San Bernardino, respectively. Please refer to the enclosed Exhibit 'A' for more information. Such a designation would greatly impair our ability to maintain the Santa Ana River Channel and Levees system as required and specified in the Maintenance Manual prepared by the Corps and turned over to the District in February of 1960.

Currently, SWF Section 7 consultation is not likely to be required for the federally supported/permitted operation and maintenance activities of the Santa Ana River Channel and Levees system since occupied SWF habitat is not present. However, the critical habitat designation would ensure that Section 7 consultation is required for all federally supported or permitted operation and maintenance activities even when the SWF is not present. The critical habitat designation would subject any Section 404 permits from the Corps for regulated maintenance activities or any Federal Emergency Management Agency (FEMA) hazard mitigation grants to the lengthy and potentially costly Federal Endangered Species Act (ESA) Section 7 consultation process.

MAR - 5 2004

U.S. FISH & WILDLIFE SERVICE

Mr. Steve Spangle, Field Supervisor
Re: Southwestern Willow
Flycatcher Critical Habitat

-2-

March 1, 2004

The Federal ESA Section 7 consultation process includes a 90 to 150 days (or more) consultation period between the Federal Agency and the Service. Since Section 7 does not provide any exemptions or expedited permitting for emergency situations, such delays could compromise flood protection and public safety in the event of an emergency. Furthermore, if the Corps' Section 404 permit or FEMA funding is delayed by the Section 7 consultation process, public safety could be compromised to an unacceptable level. The Section 7 consultation process would substantially increase the District's maintenance costs associated with biological surveys, permitting and mitigation. PR61

It is important to note that if SWF does actually occur within a flood control facility, the occupied habitat would receive legal protection through the Federal and California Endangered Species Acts as well as the California Environmental Quality Act even without a critical habitat designation. In addition, streambed alterations are regulated by the California Department of Fish and Game through Section 1600 of the Fish and Game Code. Thus, the critical habitat designation within existing flood control facilities could have significant adverse impacts to public safety while providing minimal additional benefits to the species. If the goal of designating SWF critical habitat is to provide improved habitat within the Santa Ana River Channel, we believe that the Service and/or the Corps should pursue funding for the necessary studies and habitat restoration costs rather than increasing permitting delays and costs associated with maintaining federally constructed facilities. PR 68

The Service should also consider the "Western Riverside County Multiple Species Habitat Conservation Plan" (MSHCP) which will provide greater habitat protection for the SWF. The County of Riverside has adopted the MSHCP and the District is a signatory to the Implementation Agreement. The MSHCP identifies the Santa Ana River and Prado Dam from the Orange County line to the San Bernardino County line as an existing Core. A Core is defined as "A block of Habitat of appropriate size, configuration, and vegetation characteristics to generally support the life history requirements of one or more covered species". The SWF is one of the planning species that is included in the MSHCP conservation planning process. The MSHCP includes guidelines for the maintenance of facilities to avoid and minimize the effects of these facilities on the Core biological functions and values. The MSCHP also requires specific SWF management and monitoring activities as well as the preservation of Core acreage. Please note that incidental take of listed species related to Federal activities or permits would still need to be authorized through the Section 7 consultation process following the approval of the MSHCP. For additional information regarding the MSHCP, please contact the Service's Carlsbad office, which we understand is currently working on the Biological Opinion for the MSHCP. Also, it is our understanding that the Service agreed to make critical habitat designations consistent with the reserve boundaries established in the MSHCP. PR 24

Section 4(b)(2) of the ESA requires the Service to consider economic and any other relevant impacts of designating a particular area as critical habitat. Also, the Service may exclude areas from critical habitat upon a determination that the benefits of such exclusions outweigh the benefits of designating such areas as critical habitat. Based on the above information, it is clear that the benefits of excluding flood control facilities especially the existing Santa Ana River Channel and Levees from the SWF Critical Habitat far outweigh any benefits of including them in the proposed rule. If the existing Santa Ana River Channel and Levees are not clearly excluded from the proposed Critical Habitat, the proposed rule, the NEPA document and the economic analysis will need to address the effect, including potential prohibitions, delays, increased regulatory oversight and its associated costs, that the proposed Critical Habitat designation could have on the operation, maintenance and restoration (emergency or otherwise) of the channel and levees system. W43

Mr. Steve Spangle, Field Supervisor
Re: Southwestern Willow
Flycatcher Critical Habitat

-3-

March 1, 2004

While the District understands and supports the need to protect listed species, we would like to minimize duplication of regulatory efforts. Should your staff have any questions or need additional information regarding these issues, please have them contact Teresa Tung of our Environmental-Regulatory Section at 909.955.4050 or via email at ttung@co.riverside.ca.us or Randy Sheppeard at 909.955.1306 or rsheppea@co.riverside.ca.us. I can be reached at 909.955.1250.

Very truly yours,



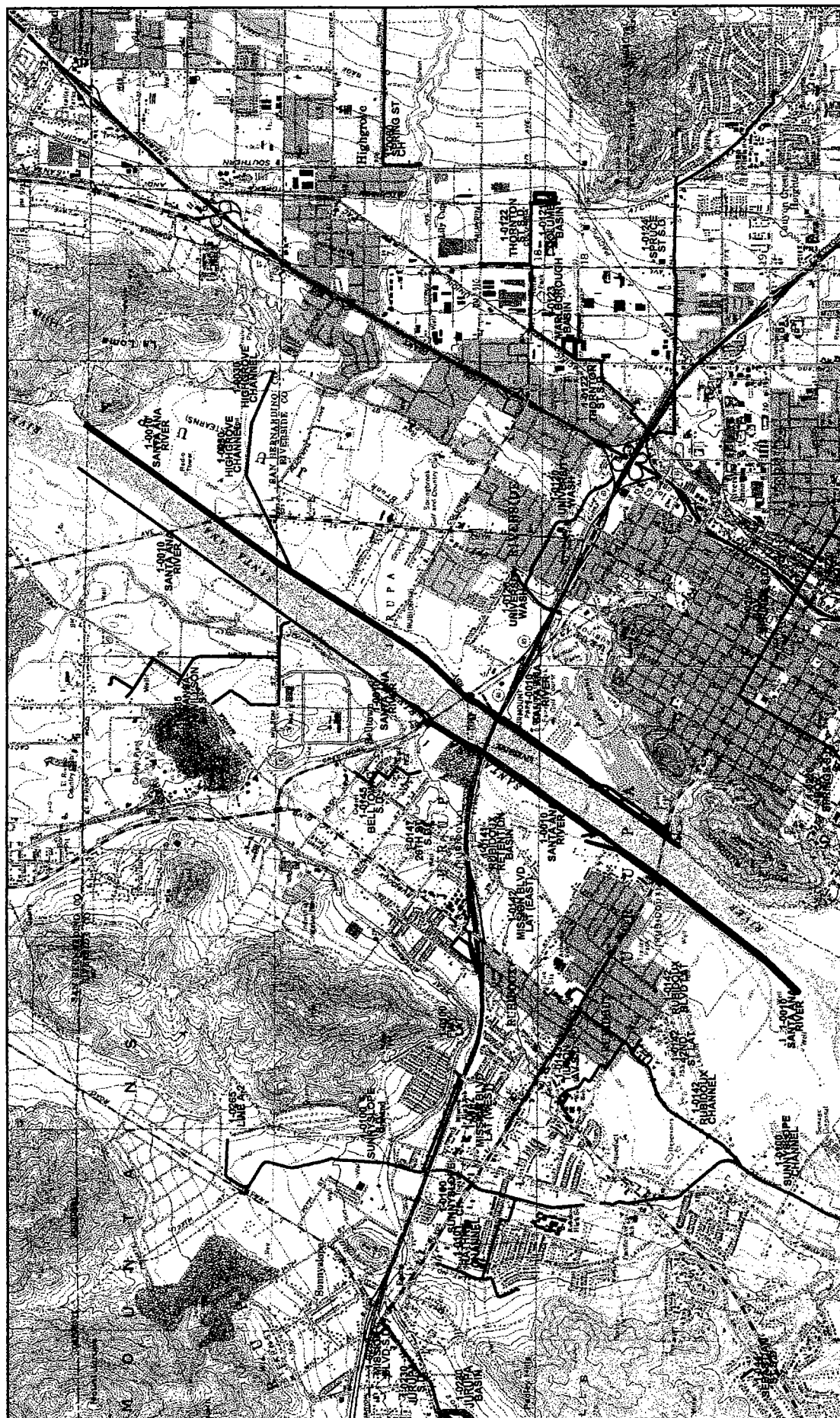
WARREN D. WILLIAMS
General Manager-Chief Engineer

Enclosure

c: Congressman Ken Calvert
Corps of Engineers
Attn: Colonel Richard G. Thompson
Supervisor Jim Venable
TLMA
Attn: Richard Lashbrook
The Carmen Group, Inc.
Attn: Mia O'Connell
Steve Stump
Steve Thomas
Zully Smith

RS:TT:mcv
PC\86538

SANTA ANA RIVER LEVEES and CHANNEL



G-019
R5

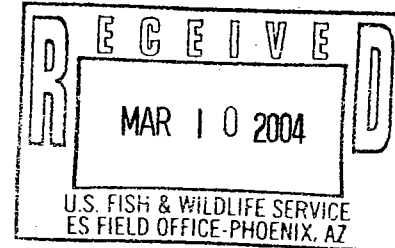
KERN RIVER WATERMASTER

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Bakersfield, CA 93380-1435
Facsimile (805) 393-6884

March 5, 2004

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED



Mr. Steve Spangle, Field Supervisor
Arizona Ecological Services Office
UNITED STATES FISH & WILDLIFE SERVICE
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

RE: WRITTEN COMMENTS OF THE KERN RIVER WATERMASTER REGARDING INTENTION TO PREPARE DRAFT ENVIRONMENTAL ASSESSMENT FOR THE PROPOSED DESIGNATION OF CRITICAL HABITAT FOR THE SOUTHWESTERN WILLOW FLYCATCHER (FEDERAL REGISTER NOTICE VOL. 69, NUMBER 13, WEDNESDAY, JANUARY 21, 2004, PAGES 2940-2943)

Dear Mr. Spangle:

These comments are prepared by the Kern River Watermaster on behalf of Kern Delta Water District, City of Bakersfield, North Kern Water Storage District, Buena Vista Water Storage District, Kern County Water Agency, Henry Miller Water District, Tulare Lake Basin Water Storage District, Hacienda Water District, Olcese Water District, Rag Gulch Water District, Kern-Tulare Water District, Cawelo Water District and Rosedale-Rio Bravo Water Storage District (collectively "Kern River Interests".) Each of these districts is dependent on the continued conservation storage of Kern River water in Isabella Reservoir for the beneficial use of urban water supplies, groundwater storage, replenishment and irrigation. These comments are presented to address our continued concern and opposition to including any portion of Isabella Reservoir or the South Fork Kern River Valley, Kern County, California in any designation of critical habitat for the Southwestern Willow Flycatcher ("SWWFC").

Previously, this office has submitted extensive written comments and accompanying technical reports relating to the proposed designation of critical habitat for the SWWFC. Specifically, we refer you to the following written comments and enclosures which are already in the possession of the Service:

1. November 24, 1993, re: "Written Comments of the Kern River Watermaster In Opposition to The Proposed Rule to List as a Federally Endangered Species the Southwestern Willow flycatcher Along With Designation of Critical Habitat (Federal Register Notice Vol. 58, Number 140, Friday, July 23, 1993, Pages 39495-39522) (Exhibit "A" attached, without enclosures)

Mr. Steve Spangie, Field Supervisor
Arizona Ecological Services Office
UNITED STATES FISH & WILDLIFE SERVICE
March 5, 2004
Page 2

2. September 25, 2001, re: "Comments of the Kern River Watermaster to the Draft Recovery Plan Southwestern Willow flycatcher (*Empidonax traillii extimus*); (Federal Register Notice, Vol. 66, Number 109, Wednesday, June 6, 2001, Pages 30477-30478) (Exhibit "B" attached, without enclosures) PL15
3. June 13, 2002, re: "Informal Request For Information Pursuant to The United States Fish And Wildlife's Letter Dated May 2, 2002, Regarding Possible Re-proposing of Critical Habitat For The Southwestern Willow Flycatcher (*Empidonax traillii extimus*) (Exhibit "C" attached, without enclosures) PL16

The Service should consider that we expressly incorporate into these comments all the comments and attachments from our prior correspondence with regard to a proposed designation of critical habitat for the SWWFC in or around Isabella Reservoir or the South Fork Kern River Valley.

I. SUMMARY

The Kern River Interests recommend that the Service include as one of its alternatives to be analyzed in its National Environmental Policy Act (42 U.S.C. 432, et. seq., "NEPA") environmental documentation as well as Endangered Species Act (16 U.S.C. 1531, et. seq., "ESA") designation of critical habitat a proposal that excludes any portion of Isabella Reservoir and/or the South Kern River Valley, Kern County, California. This is a reasonable alternative for the designation of critical habitat for the SWWFC for three primary reasons: 1) These areas do not possess the physical or biological features essential to the conservation of the SWWFC and it is unnecessary to have these lands designated as critical habitat in order to provide necessary special management and protection; 2) Based on the best scientific and commercial data available the benefits of exclusion are outweighed by the benefits of specifying the area; and 3) Designation of these areas will not promote the conservation of SWWFC and the ecosystems upon which they depend but may discourage and impede ongoing conservation efforts in the region by various private and public agencies. LO

II. COMMENTS

A. PROCEDURAL PREREQUISITES TO DESIGNATION

As a procedural matter, before the Service adopts any rule designating critical habitat for the SWWFC it should fully comply with NEPA and ESA. Specifically, the Service needs to base its determination on: 1) the best scientific data currently available; 2) only after the consideration of the economic and other relevant impacts of the designation; 3) consider and develop reasonable alternative Mr. Steve Spangle designations; 4) study the benefits of exclusion and inclusion of specific areas; and 5) CH15 PR54 LD49

Mr. Steve Spangle, Field Supervisor
Arizona Ecological Services Office
UNITED STATES FISH & WILDLIFE SERVICE
March 5, 2004
Page 3

cooperate with State and local water agencies to resolve water resources issues consistent with the requirements of ESA. ^{PR 6}

56 { The Kern River Interests request that the Service notify each of the represented public agencies with regard to each step taken by the Service so that each of these agencies can continue to provide comment on this matter.

B. DESIGNATION OF LAKE ISABELLA & SOUTH KERN RIVER VALLEY IS NOT ESSENTIAL TO THE CONSERVATION OF SWWFC-

In order for the Secretary to designate an area as critical habitat it must find that the specific area contains the physical or biological features essential to the conservation of the SWWFC and which may require special management considerations or protection. 16 U.S.C.1532(5)(A). The Secretary must base the decision on the best scientific data available after taking into consideration the economic impact and any other relevant impact of specifying any particular area as critical habitat. 16 U.S.C. 1533(b)(2). ^{PR 58}

While, in varying degree, some portions of the riparian area located within Isabella Reservoir may contain certain of the physical or biological features associated with the SWWFC, extensive scientific reports developed since 1996 indicate that habitat quantity and quality do not appear to be limiting either the size or reproductive success of the SWWFC in this region. There is no scientific study or report which concludes that it is "essential" to the conservation of the SWWFC — or worse that extinction will result — if Isabella Reservoir is excluded from designation.

PR 82 { Further, these same scientific studies demonstrate that the current regime of management activities and operations, e.g., the regulation of cattle grazing, and continued routine operation of the reservoir consistent with the current flood control criteria and existing contracts for conservation storage, has fully conserved this riparian area. Specifically, the best available scientific data demonstrates empirically that the riparian area within Isabella Reservoir has proven to be very resilient and tolerant of inundation resulting from continued routine operations of the Reservoir. There is no scientific data that demonstrates any long-term adverse effects on the riparian habitat used by the SWWFC result from current operations of Isabella Reservoir. In fact, the present riparian area located within Isabella Reservoir is thriving due to current management activities. Rather, the scientists have documented that the periodic flooding of the riparian area in high flow years disperses and establishes a high density of new seedlings and enhances growth rates for mature trees. Significantly, there is no evidence that there is a need for special management considerations or protections over and above that presently exist without any designation of critical habitat.
PR 83 {

Mr. Steve Spangle, Field Supervisor
Arizona Ecological Services Office
UNITED STATES FISH & WILDLIFE SERVICE
March 5, 2004
Page 4

PP 8A Because Isabella Reservoir and the South Kern River Fork Valley area do not meet the statutory standard to qualify as critical habitat the Service should exclude this area from any proposed designation.

C. THE BEST SCIENTIFIC AND COMMERCIAL DATA SUPPORTS EXCLUSION-

The Secretary is expressly empowered to exclude any area from critical habitat when the benefits of exclusion outweigh the benefits of specifying an area, unless it is determined that an exclusion will result in the extinction of the SWWFC. Id. The Service's regulations confirm this authority. 50 CFR 424.19

PR 85 In this instance, designation of critical habitat provides no added conservation benefit to SWWFC that does not already exist. First, as part of the Service's no jeopardy biological opinion dated June 14, 2000 (1-1-99-F-216) concerning continued routine operation of Isabella Reservoir, the United States Army Corps of Engineers ("Corps") is responsible for a wide-range of non-discretionary terms and conditions intended to address potential adverse impacts to the SWWFC and associated habitat. While the scientific data referenced in the Final Biological Opinion does not establish that effects actually caused by routine reservoir operations necessitate the imposition of these terms and conditions, the Corps has nonetheless committed to "implement or fund a habitat restoration and/or enhancement plan on . . . 1,150 acres of protected lands." In that regard, the Corps, in conjunction with the United States Fish & Wildlife Foundation, National Audubon Society, Packard Foundation, Wildlife Conservation Board/California Department of Fish & Game, and other private parties and local public agencies, is in the course of completing transactions intended to fully satisfy the current Final Biological Opinion consistent with the best scientific data that is available. Likewise, the Corps has and continues to fulfill all of the remaining provisions of the Opinion as required under Section 7 of ESA. Secondly, as detailed below, such a designation provides no further conservation benefits along the South Kern River Valley as there already exist extensive and comprehensive conservation projects dedicated to the preservation and protection of habitat available to the SWWFC. None of these ongoing conservation projects needs a critical habitat designation in order to satisfy conservation objectives suited to the SWWFC.

E91 W10 On the other hand, there is ample evidence to support the determination that the benefit of exclusion outweighs designating Isabella Reservoir and the South Kern River Valley. Significantly, a designation may likely disrupt the continued routine operation of Isabella Reservoir causing devastating economic harm to Kern County. The total area dependent upon the conservation of Kern River water stored in Isabella Reservoir exceeds 300,000 acres within the southern San Joaquin Valley portion of Kern County. Numerous public and urban water agencies have developed extensive water supply projects predicated on the continued availability of Kern River water to the region. Without the unrestricted use of the full water supply at Isabella Reservoir the continued production of valuable agricultural crops and the
Mr. Steve Spangle, Field Supervisor

Mr. Steve Spangle, Field Supervisor
Arizona Ecological Services Office
UNITED STATES FISH & WILDLIFE SERVICE
March 5, 2004
Page 5

maintenance of local urban water supplies, including two water treatment plants providing water to 25% of the urban Bakersfield area, are threatened. Based on past conditions of drought, it is readily acknowledged that a loss in supply in water can lead to hundreds of millions in dollars in reduced crop production and a like amount in increased operation costs not including the economic cost of the lost supply. (See, "Economic Impacts of 1991 Drought on Kern County Agriculture", Northwest Economics Associates (1991) and "The Economics of Potential Restrictions to Irrigation Storage in Isabella Reservoir", Northwest Economics Associates (1993).) Further, impacts are recognized to occur throughout the regional economy in the form of reductions in the production and marketing of goods and services in the region and associated loss in employment. (Id.) Furthermore, such changes in the availability of Kern River water are likely to have other significant adverse socio-economic and environmental impacts (direct, indirect and cumulative) which must be assessed and mitigated. Finally, as explained below, a designation could unintentionally discourage existing and future conservation projects that would serve to conserve habitat associated with the SWWFC. WA E91 50

D. DESIGNATION MAY DISCOURAGE ONGOING CONSERVATION EFFORTS-

RV [The current success in preserving and protecting riparian habitat beneficial to the SWWFC in the vicinity of Isabella Reservoir and the South Kern River Valley, has been possible because there has been a broad coalition of Federal, State and local public agencies along with private parties working together to develop solutions suited to the region. Under a consensus approach thousands of acres benefiting the SWWFC and other riparian species have been devoted to habitat conservation. Specifically, the United States Forest Service is responsible for managing the 1,200 acre South Fork Wildlife Area located within the limits of Isabella Reservoir consistent with routine operation and contractual requirements, the National Audubon Society owns and manages the 1,100 acre Kern River Preserve, the State Wildlife Conservation Board/California Department of Fish and Game own and manage the historic Bloomfield Ranch which exceeds over 1,400 acres (with recent acquisition of the Allen Ranch Property), and the Natural Resources Conservation Service has purchased a 92 acre permanent conservation easement from the Hafenfeld Ranch. All these projects have been developed and implemented independent of any critical habitat designation.

LO 95 PR 88 E91-7 [Significantly, very substantial projects (relating to potentially thousands of additional acres of riparian and upland habitat) have been proposed for sale for conservation purposes. However, these transactions are at a critical stage of development and have not been finally approved and implemented. The designation of critical habitat has the potential of impeding, delaying or increasing the cost of these projects. Furthermore, other private landowners in the region have indicated a willingness to consider selling portions of their lands for conservation purposes. However, a designation of critical habitat for Isabella Reservoir or the South Kern River Valley may adversely impact land values, provide an additional layer of land use regulation on adjacent lands, and constrain routine operation of Isabella Reservoir. Overall, a critical habitat designation is viewed as completely unnecessary and "heavy-handed" regulation

Mr. Steve Spangle, Field Supervisor
Arizona Ecological Services Office
UNITED STATES FISH & WILDLIFE SERVICE
March 5, 2004
Page 6

by the Federal Government which only serves to create political turmoil threatening future cooperative efforts.

Because such a designation is not required and is likely to discourage the conservation of SWWFC, the Service should exclude Isabella Reservoir and the South Kern River Valley from any designation. E9

III. CONCLUSION

I appreciate having the opportunity to assist the Service on this most important matter. Please do not hesitate to contact this office at your convenience should you have any questions or require additional information.

Very truly yours,



C.H. Williams
Kern River Watermaster

SKK:CHW:meh

cc: Congressman Calvin M. Dooley
Congressman William M. Thomas
Kern County Board of Supervisors
Cawelo Water District
City of Bakersfield, City Council
Buena Vista Water Storage District
Henry Miller Water District
Kern County Water Agency
Kern Delta Water District
Kern Tulare Water District
North Kern Water Storage District
Rag Gulch Water District
Rosedale-Rio Bravo Water Storage District
Tulare Lake Basin Water Storage District

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P. O. Box 1195
Bakersfield, CA 93302
Facsimile 805-325-7518

November 24, 1993

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Field Supervisor
Arizona Ecological Services Office
UNITED STATES FISH & WILDLIFE SERVICE
3616 W. Thomas Road, Suite 6
Phoenix, Arizona 85019

**RE: WRITTEN COMMENTS OF THE KERN RIVER WATERMASTER IN
OPPOSITION TO THE PROPOSED RULE TO LIST AS A FEDERALLY
ENDANGERED SPECIES THE SOUTHWESTERN WILLOW FLYCATCHER
ALONG WITH DESIGNATION OF CRITICAL HABITAT (FEDERAL REGISTER
NOTICE VOL. 58, NUMBER 140, FRIDAY, JULY 23, 1993, PAGES 39495-39522)**

Dear Gentlemen:

These comments are prepared by the Kern River Watermaster on behalf of Kern Delta Water District, City of Bakersfield, North Kern Water Storage District, Buena Vista Water Storage District, Henry Miller Water District, Tulare Lake Basin Water Storage District, Hacienda Water District, Olcese Water District, Rag Gulch Water District, Kern-Tulare Water District, Cawelo Water District and Rosedale-Rio Bravo Water Storage District. Each of these districts are dependant on the continued conservation storage of Kern River water in Isabella Reservoir for the beneficial uses of groundwater storage, replenishment and irrigation. These comments are presented in opposition to the proposed rule because the United States Fish and Wildlife Service's ("Service") proposal to list as an endangered species the southwestern willow flycatcher ("SWWFC") along with the designation of critical habitat encompassing all of Isabella Reservoir and significant portions of the South Fork of the Kern River is contrary to the National Environmental Policy Act ("NEPA") and the provisions of the Federal Endangered Species Act ("ESA") and the Service's own rules and regulations.

I. SUMMARY

The Service has violated NEPA by refusing to prepare an Environmental Impact Statement ("EIS") evaluating the significant environmental impacts likely to be caused by the proposed designation of critical habitat. Additionally, the Service has failed to comply with ESA in several respects including; not considering the best scientific data, economic and other relevant impacts, likely to be caused by designating Isabella Reservoir; including significant acreage as "critical habitat" which does not possess the principal biological and physical constituent elements essential to the species; not excluding Isabella Reservoir from the critical habitat designation as

EXHIBIT A

the benefits of avoiding devastating economic damage to Kern County substantially outweigh the inclusion of Isabella Reservoir because it is neither suitable habitat nor essential to the conservation of the species.

Because of the complexity of the issues involved and time limitations, these comments are only an estimate of the environmental, water management, socio-economic impacts likely to be caused by the adoption and implementation of the proposed rule designating as critical habitat Isabella Reservoir. These comments do not attempt to address the significant adverse impacts that shall be caused to those dependant on continued beneficial use of Kern River water for power generation, recreation and Kern River Valley agricultural uses, or other present uses of Kern River water. Likewise, without minimizing the significance of the increased risk of flood damage and injury associated with the proposed rule, these comments do no attempt to address the adverse impacts on the existing flood control purposes of Isabella Reservoir. Each of these concerns are serious matters that should be thoroughly studied and addressed by the Service before any critical habitat rule can be adopted.

In summary, the Service should immediately suspend any further actions to adopt the proposed rule until it has completed an Environmental Impact Statement pursuant to NEPA and has fully complied with all the provisions of ESA.

II. CURRENT CONDITIONS

Each of the above entities are either successors in interest to the historic water rights of the Kern River, confirmed and allocated according the 1888 Miller-Haggin Agreement, as amended, or certain of these districts have secondary rights to the use of Kern River water derived from long-term contracts with the City of Bakersfield. Additionally, several of these districts are either parties or direct beneficiaries to the storage rights provided in the October 23, 1964, Isabella Reservoir storage agreement titled, "Contract Among the United States of America and North Kern Water Storage District, Buena Vista Water Storage District" ("Isabella Reservoir Agreement," Exhibit "1," attached hereto and incorporated herein.)

The Kern River is the southern most major river originating in California's Sierra Nevada mountains flowing into the San Joaquin Valley. Annual April to July river runoff (standard measurement for snow melt runoff in California) indicates that flow in the Kern River fluctuates dramatically, ranging from a low of 87,400 acre-feet in 1961 to 1,545,800 million acre-feet in 1983. (Exhibit "2," attached hereto and incorporated herein.) The mean regulated flow of the Kern River following construction of Isabella Reservoir is 719,500 acre-feet, with the median flow measured at 577,000 acre-feet.

Because the Kern River has the potential to generate tremendous flows related to spring snow melt, and has demonstrated its ability to cause devastating flood damage on the San Joaquin Valley floor and in the City of Bakersfield, such as in 1937, 1938, 1941 and 1943, the United States Congress authorized as part of the Flood Control Act of 1944, the construction of Isabella Dam and Reservoir as a United States Corps of Engineers flood control project. In the Isabella Reservoir Agreement conservation storage and irrigation was recognized as a Congressionally authorized purpose. That agreement provides in part that "[t]he Districts shall have and are hereby granted the perpetual right to the exclusive irrigation use of the storage capacity of the Project. Said right . . . shall be subordinate only to the use of the Project by the United States for storage and release of water for flood control purposes . . ." (Article 1(a).) (Emphasis added.)

The total area dependant upon the conservation and reasonable beneficial use of waters of the Kern River stored in Isabella Reservoir are approximately 333,333 acres within the southern San Joaquin Valley portion of Kern County, California. (See, map Exhibit "3" attached hereto and incorporated herein.) The annual water demand of the lands dependant on Kern River water to produce agricultural crops is only satisfied in years of extremely high run-off. In years in which Kern River runoff is in excess of irrigation demand, which is only one (1) in four (4), surplus Kern River water is conserved and stored in both Isabella Reservoir and in groundwater basins beneath the San Joaquin Valley floor in Kern County in order to ensure an available local supply in future years when the Kern River natural flow is inadequate. During the historic 1986-1992 California drought, Kern River Districts were forced to rely on reserve groundwater supplies to maintain agricultural production. In 1991 alone the California drought caused the Central Valley portion of Kern County to suffer a 15 percent decline in water use; an abandonment of 110,000 acres of farm land from production; a \$9 million dollar expenditure in additional agricultural wells; and an estimated \$125 million dollar loss in farm income. (See, Economic Impacts of the 1991 Drought on Kern County Agriculture, Northwest Economic Associates, Exhibit "4" attached hereto and incorporated herein.) It is well documented that groundwater supplies decline significantly in dry years or when imported water supplies are not available. (See, Exhibit "5" attached hereto and incorporated herein.) In 1993 the average lift for the Kern River Districts ranged from 250-500 feet.

"Kern County irrigated crop acreage totaled 787,560 acres in 1992, with 247,355 acres 31% in permanent crops (tree nuts, tree fruits, and grapes) and 540,255 acres in annual crops. Nearly 282,000 acres were located in water districts with Kern River contracts and entitlements, comprising nearly 36% of the county's irrigated acreage base. Overall, the Kern River Districts accounted for 31% of total permanent crop production and 38% of annual crop production, 77,000 acres and 205,000 acres respectively. Row crops (cotton, grains, and alfalfa) in the Kern River Districts included a full 45% of county acreage." (See, November 22, 1993, report "The Economic Impacts of Potential Restrictions to Irrigation Storage in Isabella Reservoir,"

Northwest Economic Associates, hereinafter "NWEA Report," page 3, Exhibit "6" attached hereto and incorporated herein.) The 1992 production value of the crops cultivated, irrigated and produced by the Kern River Districts was \$413 million, or over 25 percent of the total county farm revenues. (NWEA Report, page 4.) This crop production generates an additional output of \$386 million in the production and marketing of goods and services by other farm-related businesses in the Kern County economy. (NWEA Report, page 5.) Total annual Kern County income linked to the Kern River Districts is over \$388 million. (NWEA Report, page 5.) "It is estimated that 6,600 farm-level wage and salary workers are employed annually in the Kern River Districts . . . [which] is estimated to generate an additional 6,600 jobs in the local economy." (NWEA Report, page 5.)

III. COMMENTS ON THE PROPOSED REGULATION

A. Proposed Listing of SWWFC as an Endangered Species-

At this time, this office is not in possession nor aware of scientific information demonstrating that the proposed listing of the SWWFC as an endangered species is not authorized under ESA. However, we expressly reserve the right to present evidence or challenge the listing element of the proposed rule should such evidence be subsequently discovered. To the extent that other interested parties have submitted written comments, scientific evidence and testimony establishing that the proposed listing of the SWWFC is not proper under ESA, the Kern River Watermaster hereby incorporates by reference such comments, documents, evidence and testimony into these comments as if stated and included at this time.

B. Proposed Designation of Critical Habitat for the SWWFC in Kern County, California¹-

1. The Service Has Failed to Comply With National Environmental Policy Act ("NEPA") Prior to Designating Critical Habitat in Kern County.

On October 15, 1993, this office provided the Service with a letter advising it that the proposed designation of critical habitat encompassing Kern County, California, constituted a major federal action requiring full compliance with NEPA. (Exhibit "7" attached hereto and incorporated herein.) At the conclusion of that letter, the Service was requested to

¹ These written comments are directed only at that portion of the proposed designation of critical habitat encompassing Kern County, California as described at pp. 39502-39505 and 39508-39509 of the July 23, 1993 Federal Register Notice. The fact that these comments are limited to Kern County should not be construed by the Service as the Kern River Watermaster agreeing with the designation of critical habitat in any other region of the proposed rule.

explain whether it intended to comply with NEPA and commence preparing an EIS. In its November 2, 1993 letter the Service confirmed that it had received the October 15, 1993, request for compliance with NEPA and indicated it would forward the letter to the Arizona field office for consideration with other comments on the proposed designation rule. (Exhibit "8" attached hereto and incorporated herein.) By letter dated November 8, 1993, and also during the November 15, 1993, public comment hearing, it was requested that the Service comply with NEPA or provide written explanation and legal authority if it determined that it will not comply. (Exhibit "9" attached hereto and incorporated herein.) As of the writing of these comments, the Service has not responded to this request.

Each of the above public agencies are authorized under various provisions of California law to operate, maintain, manage and conserve water resources developed in the County of Kern for reasonable and beneficial uses including water storage, conservation, groundwater replenishment and irrigation. As Kern River water is used in conjunction with local groundwater resources both the quantity of Kern River water available for storage in Isabella Reservoir and the timing of its release is directly related to the management of groundwater resources underlying the boundaries of the above public agencies. Reduced storage capacity in Lake Isabella or material alterations in the scheduling of the release of Kern River runoff will significantly and adversely affect the environment by reducing groundwater levels within the boundaries of these public agencies, causing land subsidence, degrading the quality of surface and sub-surface water supplies directly available for irrigation and indirectly for municipalities, increasing the probability of flood damage to urban and rural property, changing cropping patterns for approximately one-third million acres of highly productive farm land, and polluting air resources due to increased fugitive dust resulting from fallowing land which contributes to airborne diseases such as Valley Fever.

In addition, any reduction in Isabella Reservoir storage capacity for water conservation shall cause significant and comprehensive direct and indirect socio-economic impacts throughout the Southern San Joaquin Valley of Kern County by reducing available water supplies, increasing groundwater overdraft, increasing groundwater production costs, reducing the amount of agricultural lands suitable for production, and reducing agricultural and other community dependant jobs. The November 22, 1993, economic impact analysis report of the proposed designation of Isabella Reservoir, indicates that the proposed rule will cause "significant adverse impacts on the Kern County Economy." (NWEA report, pages 13-21.)

Because the Service proposes the adoption of a rule designating critical habitat which authorizes the restriction of impoundment and diversion of Kern River water stored in Isabella Reservoir, which in turn shall directly cause significant affects on the quality of the human environment, it is a major federal action requiring compliance with NEPA.

Field Supervisor
Arizona Ecological Services Office
UNITED STATES FISH & WILDLIFE SERVICE
November 24, 1993
Page 6

In the Federal Register Notice the subject of this hearing and written comments, the Service indicated that no compliance with NEPA need be prepared in connection with the proposed regulation based upon the reasons stated in the Federal Register Notice published on October 21, 1983 (48 F.R. 49244).

Enclosed is a copy of the United States District Court opinion in the matter of Douglas County v. Lujan, 810 F.Supp. 1470 (D. Oregon 1992). (Exhibit "10" attached hereto and incorporated herein.) As in the present situation concerning Lake Isabella, the Service stated in the Douglas County case, that the sole reason for not preparing an environmental impact statement in compliance with NEPA is that the designation of critical habitat is not a major federal action. The Service cited as its authority the October 21, 1983, notice concerning the ~~listing of endangered species. As in the Douglas County case, the proposed designation of~~ critical habitat encompassing portions of the South Fork of the Kern River and the entirety of the Isabella Reservoir is a major federal action that may significantly affect the quality of the human environment. In the Douglas County case the Federal District Court enjoined the Service from continuing its efforts to designate critical habitat and instead ordered that the Service comply with the requirements of NEPA prior to the adoption of the final rule designating habitat for the spotted owl.

Based on the authority of Douglas County v. Lujan and other Federal Court authority and NEPA, the above public agencies once again request that the Service immediately suspend any further action on the proposed rule for designation of critical habitat including any portion of the South Fork of the Kern River and the entirety of the Isabella Reservoir, in Kern County, California, until such time as it has completed an environmental impact statement in full compliance with NEPA.

2. The Service has Failed to Comply With the Endangered Species Act.

- a. The Service's Proposed Designation of Critical Habitat Fails to be Based Upon the Best Scientific Data Available After Taking Into Consideration Economic and any Other Relevant Impacts.

Section 1533(b)(2) of the ESA requires that the Service base its recommended designation of critical habitat on "the best scientific data available and after taking into consideration the economic impact, and any other relevant impact" of the proposed designation. 16 U.S.C. 1533(b)(2), 50 CFR 424.12(a). (Emphasis added.)

In response to the Kern River Watermaster's August 27, 1993, Freedom of Information Act request (Exhibit "11" attached hereto and incorporated herein), the Service provided copies of "all active files and records in the custody, possession, or control of

the [Service] which [] its consultants, independent contractors, or employees reviewed, considered and relied upon to support or justify the proposed rule designating as critical habitat portions of the South Fork of the Kern River and Lake Isabella Reservoir." (Exhibit "12" attached hereto and incorporated herein.)

Only three (3) of these documents directly address the Kern County portion of the critical habitat designation. (See, Entrix, Inc. Report, dated November 19, 1993 "Assessment of the Potential for Southwestern Willow Flycatcher Habitat to Develop or Occur in the Proposed Critical Habitat Area in Kern River and Isabella Reservoir Area," "Entrix Report," Exhibit "13," page 14, attached hereto and incorporated herein.) None of the information relied upon by the Service reflects any direct study or evaluation of the economic or other relevant impacts that shall be caused by the proposed designation of portions of the South Fork of the Kern River and Isabella Reservoir. "No scientific data relied upon by the Fish and Wildlife Service evaluates the South Fork Delta area of the Kern River or any association with the ongoing flood control, irrigation and recreation purposes of Isabella Reservoir. Likewise, no literature cited and relied upon by the Service reviewed or analyzed the biological and physical constituent elements essential for the conservation of the southwestern willow flycatcher in Kern County according to the criteria in 50 CFR Part 424, nor the water management data regarding that portion of the area encompassed by Isabella Reservoir reviewed. According to the proposed rule no field studies or on sight inspections by the Fish and Wildlife Service personnel were performed." (Entrix Report, page 4.) Instead, the Service explained in its response to the Kern River Watermaster's request that "the Service has performed no studies or analyses relating to anticipated impacts, changes, alternations or other modifications, of the present historical storage, release, operation and use of the Kern River water in the Isabella Reservoir that would result if the listing and designation of critical habitat proposed in 58 FR 39495 were made final. By law, those effects are determined through mechanisms of the Act (e.g. sections 7 and 10) following listing, and/or through the Service's economic analysis of critical habitat designation. This latter analysis is being initiated in accordance with 50 CFR Section 424.19. Where conservation of the southwestern willow flycatcher involves water resource issues, those issues will be resolved in accordance with the Act [section 2(c)(2)]." (Exhibit "12.")

The Service cannot side-step the mandatory procedures and factual determinations specified in Section 4 of ESA which are to occur prior to the designation of critical habitat, by reference to future procedures and requirements specified in Sections 2, 7 and 10 of ESA, which may be invoked only after a listing and designation are lawfully determined.

First, the Service points to Section 1531(c)(2) to support its insufficient record. While it is certainly correct that the Service is mandated by Congress to "cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species..." (Kern River Watermaster Association v. U.S. Fish & Wildlife Service, 1993 WL 131, at *13).

Field Supervisor

Arizona Ecological Services Office

UNITED STATES FISH & WILDLIFE SERVICE

November 24, 1993

Page 8

on the best scientific data available and after taking into consideration the economic and other relevant impacts of a proposed designation. (16 U.S.C. 1533(b)(2)). In this instance, the Service has admitted that its proposed designation was made without benefit of studies or analyses relating to anticipated impacts. (Exhibit "12.") None of the affected public agencies were contacted nor consulted with regard to the likely impacts of the proposed critical habitat designation. The procedures adopted by the Service deny the affected local agencies an opportunity to review, comment and address the economic and other relevant impacts likely to be caused by the proposed critical habitat designation.

In Douglas County v. Lujan, 810 F.Supp. 1470, 1479 (D.Or.1992), the court explained the critical habitat designation process detailed in ESA. "First, FWS must ~~identify areas that meet the scientific definition of critical habitat found in 16 U.S.C. 1532(5)(A).~~ Then, FWS is to consider the economic and other relevant impacts of designation for each area. After consideration of the economic and other relevant impacts, FWS must determine whether any identified areas should be excluded from the final critical habitat designation because the benefits of exclusion outweigh the benefits of designation 'Any other relevant impact' can logically be construed as including the wide range of impacts required to be analyzed in preparing NEPA documentation." (Emphasis added.)

The Service should immediately suspend procedures for adopting the proposed rule designating critical habitat until such time as it has gathered all the available relevant information sufficient for it to make the required analyses based on field studies, NEPA compliance, a review of the scientific data addressing the biological and physical constituent elements essential for the conservation of the southwestern willow flycatcher in Kern County, a social-economic analysis focused on the impacts of the proposed designation on the ongoing flood control, irrigation and recreation purposes of Isabella Reservoir and related water management issues.

Second, the Service points to Sections 7 (Interagency Cooperation) and 10 (Exceptions) of ESA as explanation for why it has no understanding of the likely impacts of its proposed designation of critical habitat. Reliance on these provisions of ESA miss the legal point. Whether or not in the course of future consultations between Federal agencies or through issuance of an incidental take permit the impacts of the proposed critical habitat designation may be addressed and even mitigated is non-responsive to the directives of Congress. Section 4 of ESA independently mandates that the Service become aware of the economic and other relevant impacts when it proposes critical habitat designation. Applying the standards adopted by the Service with regard to interagency consultations,² the impact analysis of the critical habitat designation must at a minimum identify and evaluate the direct and indirect impacts of the

Field Supervisor

Arizona Ecological Services Office

UNITED STATES FISH & WILDLIFE SERVICE

November 24, 1993

Page 9

proposed designation on all areas affected not merely the immediate area involved in the designation. The clear intent of Section 4 of ESA is to provide the Service with a current and complete analysis of the impacts of a proposed designation at the earliest stage in the process so that the Service can become aware and evaluate the relative benefits and impacts of alternative critical habitat designations. The Service's failure to conduct the required scientific investigation and impact analysis prior to announcing the proposed designation resulted in the inclusion of significant areas within the designation which failed to contain any of the requisite biological and physical constituent elements of SWWFC critical habitat and without benefit of the evidence establishing the adverse impacts caused to ongoing reservoir and water resource uses. (Entrix Report, pages 1-3.)

~~Third, the Service relies on its not yet initiated economic analysis~~
pursuant to 50 CFR 424.19 to justify its lack of understanding of the likely impacts of the proposed designation. Despite the wording of this regulation, which may imply that the Secretary may begin his required impact analysis after an initial proposed rule is made public, ESA itself requires that the "Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat." 16 U.S.C. 1532(b)(2). A thorough impact analysis should be conducted at the earliest possible time and prior to a proposed critical habitat designation for two (2) basic reasons: 1) a preliminary impact analysis prior to the publishing of the proposed critical habitat designation will lead to better government decision making by best assuring that the Service is fully informed regarding all likely impacts of the contemplated designation; and 2) the due process rights of the affected local public agencies, landowners and water users dependant on the Kern River and Isabella Reservoir, require that the impact analysis be conducted by the Service and made public and available for comment at a time and in a manner so as to provide a reasonable opportunity to participate in the decision making process by making timely, effective and meaningful written comments and sworn testimony. As the Service has chosen to conduct an impact analysis after publication of its Federal Register Notice, and after conclusion of the November 15, 1993, hearing and November 30, 1993, written comment deadline, the Service has effectively withheld and secreted from the public the Service's impact analysis. Such a process deprives these interested parties of due process of law by eliminating their opportunity to provide evidence in rebuttal or support of the Service's conclusions.

Should the Service continue with its proposal to designate critical habitat in Kern County, it should immediately proceed to adopt and implement the procedures

employed in the Douglas County spotted-owl case.³ Specifically, the Service should expand the opportunity for public participation and analysis by taking the following measures:

1. Based upon the November 15, 1993, public hearing, November 30, 1993, written comments and additional study and collection of data by the Service, the Service should prepare a preliminary economic and other relevant impact analysis;

2. A summary of the preliminary economic and other relevant impact analysis should be published in the Federal Register and the complete study should be made available to the public for review and sixty (60) day written comment;

~~3. Based upon the preliminary economic and other~~
relevant impact analysis and written comments from the public, the Service should make a final economic and other relevant impact analysis prior to preparing a revised proposed rule designating critical habitat;

4. The revised proposed rule should be published in the Federal Register providing the public the opportunity to make written comment;

5. Based on the final economic and other relevant impact analysis and written comments from the public, the final rule should be published;

6. In conjunction with the required ESA impact analysis, the Service should immediately commence preparation of an EIS pursuant to NEPA.

b. The Scope of Proposed Critical Habitat Designation is Overly Inclusive:

The provisions of the ESA and the Code of Federal Regulations demonstrate that the geographic area described in the proposed rule designating critical habitat is overly inclusive and contains significant acreage inappropriately labeled as "critical habitat."

ESA specifies that critical habitat only includes "areas outside the geographical area occupied by the species at the time it is listed . . . upon

³ While in the Douglas County case the Service conducted a preliminary economic and other relevant impact analysis of the potential critical habitat designations before publication of the proposed rule, it is not too late for the Service to redirect its course to assure full and meaningful public participation in the contemplated critical

determination by the Secretary that such areas are essential to the conservation of the species." 16 U.S.C. 1532(5)(A)(ii). (Emphasis added.) The Code of Federal Regulations elucidates this provision and provides that the "Secretary shall designate as critical habitat areas outside the geographic area presently occupied by a species only when the designation limited to its present range would be inadequate to ensure the conservation of the species." 50 CFR 424.12(e). (Emphasis added.) Further, "[e]xcept in those areas determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the . . . endangered species." 16 U.S.C. 1532(5)(C). (Emphasis added.) "When considering the designation of critical habitat, the Secretary shall focus on the principal biological and physical constituent elements within the defined area that are essential to the conservation of the species." 50 CFR 424.12(b). (Emphasis added.)

The scope of the proposed designation is erroneous in at least two (2) respects:

First, that portion of the designation including the North Fork of the Kern River and the surface water area of Isabella Reservoir and the perimeter area 100 meters above such surface water area does not possess the requisite biological and physical constituent elements of SWWFC habitat. (Entrix Report, pages 1, 10-13.) In relevant part the Entrix Report provides,

"Normal or prolonged high water levels would probably reduce the vegetation to small patches along the shoreline which would not be extensive enough for willow flycatchers and would lack the multi-layer habitat structure required as breeding habitat. There are no records of southwestern willow flycatchers breeding along the shoreline of Lake Isabella (Laymon 1993; Whitfield 1993) . . .
"

"North Fork vegetation occurs in narrow bands, is unlikely to form the multi-layered dense vegetation required by the flycatcher, and probably lacks the water table necessary to create the breeding habitat required by the southwestern willow flycatcher. No willow flycatchers have been reported for this area (Laymon 1993; Whitfield 1993)." (Entrix Report, pages 12-13.)

Second, significant portions of the South Fork Delta area of Isabella Reservoir between the maximum storage capacity point located at approximately 2611 elevation down to the 2560 elevation are not presently occupied by any SWWFC and there is no evidence presented in the documents relied upon by the Service to establish that the inclusion of this area is essential to the conservation of the SWWFC or that other acreage designated or appropriate for designation is not adequate to ensure the conservation of the species. (Entrix Report, pages 1, 11-14.) The biological report states in part,

"No willow flycatchers were observed in the South Fork Delta in 1993 even though considerable vegetation was present (Whitfield 1993) The instability of the habitat subject to fluctuating water levels in the South Fork Delta resulting from the fulfillment of flood control and conservation storage purposes of Isabella Reservoir, creates significant doubt that this area is suitable breeding habitat for the southwestern willow flycatcher. There is no evidence that preservation of the habitat below the 2,600 foot elevation line is essential to the conservation of the species." (Entrix Report, page 13.)

- c. Benefits of Excluding All Portions of Isabella Reservoir From the Critical Habitat Designation Substantially Outweigh Those of Inclusion.

ESA instructs the Secretary that he "may exclude from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." 16 U.S.C. 1533(b)(2). (Emphasis added.) Further, the rules promulgated by the Service provide that the Service "shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon the proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat." 50 CFR 424.19. (Emphasis added.)

In this instance, the benefits of excluding all of the Isabella Reservoir from the critical habitat designation is overwhelmingly greater than the benefits of specifying any portion of Isabella Reservoir as critical habitat for the SWWFC. Based on calculations⁴ evaluating the designation described in the proposed rule, it is probable that such a designation shall cause substantial economic losses to the several public agencies and there residents or landowners, severe disruption of the daily and long-term management practices of Kern River water resources throughout the Southern San Joaquin Valley, and significant direct and indirect adverse environmental impacts.

According to the November 22, 1993, NWEA Report a restriction on the conservation storage function of Isabella Reservoir will result in an annual net ~~increase of 78,425 acre-feet of groundwater pumping in the already significantly overdrafted~~ basin underlying the southern San Joaquin Valley. (NWEA Report, page 15.) This additional pumping in turn causes an annual increase in district and on-farm pumping costs of \$4.3 million dollars, \$2.3 million dollars in new wells, and \$0.5 million dollars in new operation and maintenance expenses. (NWEA Report, page 20.) The value of water lost from surplus imported water is \$1.6 million dollars annually. (NWEA Report, pages 18-20.) An additional \$3.4 million dollars annually is lost due to Kern River water not being beneficially used in Kern County. (NWEA Report, pages 17-18, 20.) The annual regional economic loss is estimated at \$12.2 million dollars and 400 permanent jobs. The total annual economic impact of designating Isabella Reservoir as critical habitat is estimated at \$26.2 million dollars or \$617.8 million dollars present value over time. (NWEA Report, page 21.)

On the other side of the ledger, the proposed designation of Isabella Reservoir could only provide an intermittent and unstable area for southwestern willow flycatcher breeding habitat. (Entrix Report, pages 1-3, 13-14.) The best scientific and commercial available data demonstrates that failure to include Isabella Reservoir will not result in the extinction of the SWWFC nor is it essential to the conservation of the species. Presently, the SWWFC is concentrated in five (5) distinct locations within an area of 1250 acres primarily on the Nature Conservancy's Kern River Preserve and the adjoining United States Forest Service South Fork Wildlife Area outside the inundation area. (Entrix Report, page 7.) Additional habitat exists upstream within the Bloomfield Ranch currently being purchased by the California Department of Fish and Game. (Entrix Report, page 17.) The SWWFC is not limited by habitat, but rather by cowbird predation. (Entrix Report, pages 16-17.) It has been estimated that 2

⁴ These written comments as well as those technical reports prepared by NWEA and ENTRIX, are necessarily based upon the information presently available from the Service with regard to the designation of critical habitat. Should the Service provide additional information with regard to the precise area encompassed in the proposed designation, details with regard to how the ongoing Isabella Reservoir operations may be affected by the proposed designation, or any other material changes to the proposed rule, the estimates made to date would

comprehensive cowbird control program for the existing southwestern willow flycatcher habitat area would require approximately 14 traps with up to three (3) times daily maintenance. (Whitfield 1993). Based on existing cowbird programs and the test program administered by the Kern River Research Center in 1992, an annual budget of approximately \$24,000.00 is sufficient to conduct the recommended action. (Whitfield 1993). (Entrix Report, page 17.) "A cowbird control program when combined with habitat restoration on public lands and ecological preserves outside Isabella Reservoir, the California Department of Fish and Game's purchase of existing upstream habitat within the Bloomfield Ranch, and voluntary agreements with private landowners which may provide for the negotiated purchase of necessary conservation easements coordinated with ongoing cattle operations, is more than adequate to ensure the conservation of the species without designation of critical habitat." (Entrix Report, page 2.) Furthermore, such a ~~management solution would benefit over forty (40) sensitive species of birds in the area.~~ (Entrix Report, page 16.)

Because no portion of Isabella Reservoir is considered suitable and stable habitat for the SWWFC, and because it is not essential to the conservation of the species and if omitted would not cause an extinction of the species, and because a cowbird control and habitat management program can directly result in a significant increase in the SWWFC population at a modest annual expense in contrast to causing millions of dollars of economic damage to the Kern River Valley and Southern San Joaquin Valley economies if Isabella Reservoir were included, the Secretary has the authority to exclude all of Isabella Reservoir from any proposed designation of critical habitat as the benefits of such an exclusion outweigh the benefits of inclusion.

- d. The Service Failed to Address and Evaluate The Impacts of The Proposed Critical Habitat Designation on The Ongoing Isabella Reservoir Operations.

The ESA requires that a proposed rule designating critical habitat "include a summary . . . [which] shall to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation." 16 U.S.C. 1533(b)(8). (Emphasis added.) (See also, 50 CFR 424.16.)

As indicated previously, the proposed rule was published and submitted for public comment without benefit of any direct consultation with interested agencies and persons in Kern County, the gathering of pertinent hydrology, storage and release records, making a single field inspection of the area and the facilities involved, or any other effort to obtain relevant information readily available from the Corps of Engineers, the United States Forest Service, the Kern River Watermaster, or any of the public agencies and municipalities

Field Supervisor

Arizona Ecological Services Office

UNITED STATES FISH & WILDLIFE SERVICE

November 24, 1993

Page 15

dependant upon the conservation storage of Kern River water in Isabella Reservoir. No attempt was made to notify or receive data regarding the potential impacts of the proposed rule from the hundreds of farmers and thousands of citizens relying on the continued flood control and conservation storage purposes of Isabella Reservoir.

The text of the proposed rule submitted makes no attempt to describe and evaluate whether the flood control and conservation storage in Isabella Reservoir may either adversely modify the proposed designated habitat or may be affected by such designation. Instead it states in general and conclusory terms that activities covered by 16 U.S.C. 1533(b)(8) may include, "[w]ater diversion or impoundment, groundwater pumping, or any other activity which may alter the quantity or quality of surface or subsurface water flow. Activities ~~which alter the quantity and quality of surface or subsurface water flow may affect riparian~~ vegetation, food availability, or the general suitability of the site for nesting." (Federal Register 39504.) Such a perfunctory statement falls far short of the Congressional directive that the proposed rule shall provide "to the maximum extent practicable" a description and evaluation of those activities that may be impacted by the proposed designation. The Service's failure to comply with these provisions of ESA rendered the proposed rule void.

- e. The Service is Required to Acquire Any Interest in Land or Water Rights.

To the extent that the Service proposes the designation of critical habitat encompassing Isabella Reservoir which causes any change or adverse impact on present storage and release operations in Isabella Reservoir, the vested appropriative rights to the reasonable and beneficial use of Kern River water, or any other contract or water right held by the above-public agencies, the Service is compelled to "acquire by purchase, donation, or otherwise, lands, waters, or interests therein . . ." 16 U.S.C. 1534. (Emphasis added.) Any action which confiscates or otherwise deprives the affected public agencies or their landowners and water users of their right to property shall constitute a violation of the due process and takings clauses of the United States and California Constitutions and subject the Service to legal action.

- f. The Critical Habitat of The SWWFC Within Kern County, California is Not Determinable and the Service Should Defer Designation Pending Further Study.

The Service regulations implementing ESA provide that "critical habitat is not determinable when one or both of the following situations exist: (i) information sufficient to perform the required analyses of the impacts of the designation is lacking". 50 CFR 424.12(a)(2)(i). (Emphasis added.) When such information and analysis is

not available and before the Service it is permissible to extend the designation period one (1) year. 50 CFR 424.17(b).

In this instance the Service does not presently have sufficient information to perform the required analyses of the impacts of designating critical habitat for the SWWFC within Kern County. First, the Service has failed to commence and conclude the required NEPA analysis to evaluate the environmental effects of the proposed designation. As required by NEPA, such an analysis will necessarily include the development of alternative proposals to that currently proposed by the Service. Second, the Service has not collected the information, which is available from field inspections, biological, engineering, hydrological, dam operation studies, necessary to evaluate whether existing uses of Isabella Reservoir may be affected. ~~At the conclusion of the Entrix Report it states:~~

"Insufficient evidence is available to determine if areas outside the existing breeding habitat in the Kern River Valley could support nesting southwestern willow flycatchers. In particular, more time is needed to determine if the soils, hydrology and ground water table are sufficient to create habitat conditions to promote the dense, multi-layered riparian woodland required for breeding southwestern willow flycatchers. A designation of critical habitat including any portion of Isabella Reservoir is not determinable at this time as the Fish and Wildlife Service has not provided information or conducted studies on the biological and physical constituent elements essential to the conservation of the southwestern willow flycatcher and the socio-economic analyses necessary to evaluate the impacts of including Isabella Reservoir as specified in CFR 424.12(a) and (b)(5). The Service should either delete altogether Isabella Reservoir from the critical habitat designation or defer consideration for up to one (1) year pending a comprehensive review to develop alternative management strategies that would simultaneously benefit the southwestern willow flycatcher while avoiding any conflict with the required flood control and conservation storage purposes of Isabella Reservoir." (Entrix Report, page 15)

Field Supervisor

Arizona Ecological Services Office

UNITED STATES FISH & WILDLIFE SERVICE

November 24, 1993

Page 17

IV. CONCLUSION

Based on the above written comments and the public comments made at the November 15, 1993 hearing, the Kern River Watermaster and those agencies, landowners and residents dependant upon the continued conservation storage of Kern River water in Isabella Reservoir, respectfully request that the Service immediately suspend any further actions to adopt the proposed rule to list the southwestern willow flycatcher as endangered and designate as critical habitat Isabella Reservoir and portions of the South Fork of the Kern River.

Very truly yours,



C. H. Williams

Kern River Watermaster

Enclosures

cc: Congressman Calvin M. Dooley
Congressman William M. Thomas
Kern County Board of Supervisors
City of Bakersfield, City Council
Buena Vista Water Storage District, Board of Directors
Cawelo Water District, Board of Directors
Hacienda Water District, Board of Directors
Henry Miller Water District, Board of Directors
Kern Delta Water District, Board of Directors
Kern Tulare Water District, Board of Directors
North Kern Water Storage District
Olcese Water District, Board of Directors
Rag Gulch Water District, Board of Directors
Rosedale-Rio Bravo Improvement District, Board of Directors
Rosedale-Rio Bravo Water Storage District, Board of Directors
Tulare Lake Basin Water Storage Districts, Board of Directors
Scott K. Kuney, Esq.

KERN RIVER WATERMASTER

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September 25, 2001

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CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Field Supervisor
Arizona Ecological Services Field Office
~~United States Fish and Wildlife Service~~
2321 West Royal Palm Road, Suite 103
Phoenix, AZ 85021-4951

RE: COMMENTS OF THE KERN RIVER WATERMASTER TO THE DRAFT
RECOVERY PLAN SOUTHWESTERN WILLOW FLYCATCHER
(Empidonax traillii extimus); (Federal Register Notice, Vol. 66, Number
109, Wednesday, June 6, 2001, Pages 30477-30478)

Dear Gentlemen:

These written comments are submitted by the Kern River Water Master ("Watermaster") on behalf of the City of Bakersfield, North Kern Water Storage District, Kern Delta Water District, Buena Vista Water Storage District, Kern County Water Agency, and Tulare Lake Basin Water Storage District. Each of these agencies have various historic rights to use Kern River water as well as the perpetual and exclusive right to store up to 535,000 acre feet of Kern River water at any one time in the conservation storage space of Isabella Reservoir as provided in that certain contract between the United States of America and various local agencies and their successors, entitled "Contract Among The United States of America And North Kern Water Storage District, Buena Vista Water Storage District, Tulare Lake Basin Water Storage District, and Hacienda Water District", date October 23, 1964. Each of these local agencies or municipalities are dependent on the continued conservation storage of Kern River water in Isabella Reservoir for the beneficial uses of groundwater storage, replenishment and irrigation. These comments are presented in opposition to the proposed rule adopting the draft Recovery Plan Southwestern Willow Flycatcher (*Empidonax traillii extimus*) ("Plan").

While these comments may likewise be applicable to other facilities and geographic locations affected by the Plan these comments are made most particularly with regard to

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Isabella Dam and Reservoir located on the Kern River in the County of Kern, California. Pursuant to the Federal Endangered Species Act (16 U.S.C. 1531 et. seq., "ESA") the Secretary of the Interior ("Secretary") and the United States Fish and Wildlife Service ("Service") are each required to consider all information presented during the public comment period prior to approval and implementation of any Recovery Plan. (16 U.S.C. 1533(f)(4) and (5).) The Watermaster respectfully requests that these written comments and enclosures be carefully considered by the Secretary and the Service prior to any approval and implementation of any recovery plan relating to the Southwestern Willow Flycatcher ("SWWFC").

I. OVERVIEW

The Kern River is the southern most major river originating in California's Sierra Nevada mountains flowing into the San Joaquin Valley. Annual April to July river runoff (standard measurement for snow melt runoff in California) indicates that flow in the Kern River fluctuates dramatically, ranging from a low of 87,400 acre-feet in 1961 to 1,545,800 million acre-feet in 1983. Because the Kern River has the potential to generate tremendous flows related to spring snow melt, and has demonstrated its ability to cause devastating flood damage on the San Joaquin Valley floor and in the City of Bakersfield, such as in 1937, 1938, 1941 and 1943, the United States Congress authorized as part of the Flood Control Act of 1944, the construction of Isabella Dam and Reservoir as a United States Army Corps of Engineers ("Corps") flood control project.

The total area dependent upon the conservation of Kern River water stored in Isabella Reservoir exceeds 300,000 acres within the southern San Joaquin Valley portion of Kern County, California. (See, map Exhibit 1, attached hereto and incorporated herein.) The annual water demand of the lands dependent on Kern River water to produce agricultural crops is only satisfied in years of high run-off. In years in which Kern River runoff is in excess of irrigation demand, surplus Kern River water is conserved and stored in both Isabella Reservoir and in groundwater basins beneath the San Joaquin Valley floor in Kern County in order to ensure available local supply in future years when the Kern River natural flow is inadequate. During the historic 1986-1992 California drought, local agencies and municipalities were forced to rely on reserve groundwater supplies to maintain agricultural and urban water needs. In 1991 alone the California drought caused the Central Valley portion of Kern County to suffer a 15 percent decline in water use that resulted in an abandonment of 110,000 acres of farm land from production; a \$9 million dollar expenditure in additional agricultural wells; and an estimated \$125 million dollar loss in farm income. ("Economic Impacts of the 1991 Drought on Kern County Agriculture", Northwest Economic Associates (1991).) The farmers dependent on Kern River water generate an excess of \$400 million dollars in permanent and annual crop production each year and nearly an equal amount each year in the production and marketing of goods and services by other farm related businesses in Kern County totaling nearly three-quarters of billion dollars. ("The Economic Impacts of Potential Restrictions to Irrigation Storage in Isabella Reservoir", Northwest Economic Associates (1993).) Thousands of farm and other local jobs are supported by virtue of the Kern River water stored in Isabella Reservoir. (Id.)

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II. GENERAL COMMENTS

1. The Plan as proposed fails to comply with ESA and can not be approved or implemented as drafted;

2. The ESA requires that a recovery plan include to the maximum extent practicable "site specific management actions as may be necessary to achieve" conservation of an endangered species. (16 U.S.C. 1533(f)(1)(B)(i).) However, the analysis, conclusions and recommendations for action stated in the Plan with regard to the SWWFC population, habitat and impact of operations of Isabella Reservoir are general and not specifically related to this specific site. Generally the methodology of the Plan is to state certain general observations with regard to adverse affects at certain dam and reservoir sites (based on circumstances existing in Arizona, Colorado and New Mexico) and then extrapolate the analysis, conclusions and recommendations to all dams and reservoirs at all locations known to be frequented by SWWFC. Fundamentally absent from the Plan is any analysis and scientific data regarding each of the specific sites which are known to host SWWFC populations. Specifically, the Plan contains little or no detailed study, analysis and conclusions with regard to specific circumstances relevant to Isabella Reservoir. Further compounding the deficiency in the Plan is the fact that it fails to contain any scientific data and analysis to support the implicit conclusion that what adverse affects may result from dams and reservoirs operated on, for example the Gila River, Verde River, Middle Rio Grande, and Lower Colorado River, has scientific validity and applicability to the circumstances on the Kern River of California. Absent a scientifically based nexus establishing that the data collected from one site is credible scientific data equally applicable to Isabella Reservoir the general assumptions and recommendations contained in the Plan are unsupported and hence are arbitrary and capricious;

3. The Plan has not been developed in compliance with Section 4 of the ESA as it is not based on the best scientific and commercial data available to the Secretary with regard to Isabella Reservoir. (16 U.S.C. 1533 (f)(1)). Specifically, the Plan fails to reference, consider and apply the best scientific and commercial data currently available to the Service with regard to the SWWFC and the riparian habitat in the vicinity of the Isabella Reservoir and therefore the analysis, conclusions and recommendations of the Plan with regard to Isabella Reservoir are arbitrary and capricious;

4. The most current and complete scientific data regarding the SWWFC and associated habitat in the vicinity of Isabella Reservoir indicate that there is no scientific basis to recommend any changes in historic operation of Isabella Reservoir. Since 1996, comprehensive scientific data regarding riparian trees and vegetation within the Reservoir comprising a portion of the riparian zone of the South Fork of the Kern River has been collected and reported to the Service. This scientific data demonstrates empirically that this riparian area has proven to be far more resilient and tolerant of inundation than predicted, with no documented long-term effects on the riparian habitat used by the SWWFC. In fact, the present riparian zone located within Isabella Reservoir is thriving due to current management activities and operations, e.g., the exclusion of cattle grazing, and continued

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routine operation of reservoir consistent with the current flood control criteria and existing contracts for conservation storage. Significantly, the scientists have documented that the periodic flooding of the riparian area in high flow years disperses and establishes a high density of new seedlings and enhances growth rates for mature trees. In fact, most SWWFC nest in areas where habitat did not exist prior to 1981. In sum, the scientific data indicates that habitat quantity and quality do not appear to be limiting either the size or reproductive success of SWWFC on the South Fork;

5. No Plan should be approved by the Secretary or implemented by the Service until such time as it is revised to conform to the scientific data regarding Isabella Reservoir. As indicated by the scientific data, no modifications or restrictions in current reservoir operations at Isabella Reservoir have been proven to be necessary or appropriate in order to conserve SWWFC. The Plan should be revised to provide that the Secretary and the Service will cooperate with the Corps to assist in the ongoing Section 7 consultation process. The revised Plan should omit any recommendation adopting and implementing any management action which requires that Isabella Reservoir operations be changed as an element of the recovery planning process;

6. It is the declared policy of Congress that all Federal agencies cooperate with State and local agencies to resolve water resources issues in concert with conservation of endangered species. (16 U.S.C. 1531(c)(2).) Several local public agencies and municipalities responsible for managing Kern River water resources as well as the general public of Kern County have a vital interest in full utilization of Isabella Reservoir and resolving these water resource issues. In this instance, the Secretary should direct the Service to notice public hearings to permit further opportunity for review and comment on the site specific scientific data, future operation of Isabella Reservoir, and any management action proposed by the Service with regard to Isabella Reservoir. Any Plan approved by the Secretary and implemented by the Service must incorporate an estimate of the cost to carry out the recommended management actions directed at Isabella Reservoir. (16 U.S.C. 1533(f)(1)(iii)). Furthermore, the Service is required to provide in the Plan an explanation of how each of the management actions proposed for Isabella Reservoir will promote the delisting of the SWWFC.

III. SPECIFIC COMMENTS

1. (V. Page 137-178, Appendix Q.) The Plan is arbitrary and capricious and hence contrary to law in that it fails to reference, discuss, consider, or apply and therefore be based upon the best scientific and commercial data currently available with regard to the SWWFC and Isabella Reservoir. (16 U.S.C. 1533 (f)(1).) Specifically, in the Overview section of the Plan the Service states that Section IV. Literature Cited (pages 137-178) contains the "full citations for all literature referenced in this recovery plan and associated Issue Papers" relied upon to support the Plan. (Page 2). (Emphasis added.) Similarly, in Appendix Q, the Service has identified "sources of data" utilized by the Service in preparing the Plan. However, extensive additional scientific and commercial data exists and is available regarding the SWWFC, the SWWFC habitat in the environs of Isabella Reservoir, and the effects of Isabella Reservoir and its operations on both the SWWFC and its habitat. This data has been systematically excluded from the Literature Cited and Appendix portions of the Plan. A majority of this scientific data and reports have previously been provided to

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the Service long in advance of the draft Plan being prepared. All of the reports are readily available from the Corps. Notwithstanding the fact that the Service was advised of the existence of additional scientific data directly related to Isabella Reservoir, the Service has completely ignored the following scientific data and reports:

1. Final Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Reservoir, California Delivery Order 0064, Environmental Services Contract No. (DACW05-95-D-0003)
Task 2. Evaluation of the 1997, 1998, 1999 Effects of Isabella Dam and Lake Operations on Riparian Vegetation along the South Fork Kern River (May, 2000)
2. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California, (Delivery Order 0087; Environmental Services Contract No. (DACW05-98-D-0020)
Task 2. 1997-2000 Southwestern Willow Flycatcher and Least Bell's Vireo Surveys, Comprehensive Summary Report (January, 2001).
3. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California Delivery Order 0087, Environmental Services Contract (DACW05-98-D-0020)
Task 6. Final Habitat Suitability Index Model for the Southwestern Willow Flycatcher (*Empidonax traillii extimus*) along the South Fork Kern River, Kern County, California) (February, 2001)
4. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California Delivery Order 0028 Environmental Services Contract No. (DACW05-98-D-0020)
Task 7. Evaluation of the 1997, 1998 and 1999 Effects of Isabella Dam and Lake Operations on Herbaceous Vegetation Along the South Fork Kern River (June, 2001)
5. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California Delivery Order 0028 Environmental Services Contract No. (DACW05-98-D-0020)
Task 8. Evaluation of the Effects of Isabella Dam and Lake Operations on Riparian Tree Growth along the South Fork Kern River (May, 2001)

A true and correct copy of each of these scientific reports and data is enclosed with these comments and incorporated herein as if stated in their entirety;

2. (II. Page 29.) The Service is correct when it acknowledged that "the South Fork of the Kern River is one of the few places where riparian habitat has increased substantially over the past 20 years.". As is documented by detailed studies performed by botanists for the environmental

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consulting firm of Jones & Stokes, digitized aerial photographs from 1947, 1954, 1981, and 1997 provide the basis for an accurate calculation of the extent of the riparian area currently existing both before, after and presently within the gross pool of Isabella Reservoir. Specifically according to the findings of Jones & Stokes, "in 1947, prior to the development of Isabella Dam and Lake, approximately 823 acres . . . of riparian forest existed along both the North and South Forks of the Kern River. Approximately 450 acres . . . were lost when the reservoir was filled in 1954. After the Corps voluntarily established a no grazing policy . . . major flooding in 1982-83 permitted the regeneration of black willows in areas that were previously barren. . . By 1997, 1,059 acres . . . existed along the South Fork below an elevation of 2,625 feet, representing a net increase of 686 acres since 1981 and 236 acres . . . since 1947." Given that current operations of Isabella Reservoir have actually increased the riparian acreage in the reservoir there is no reason to alter these current operations. In fact, restricting periodic inundation of the upper portions of the reservoir is likely to cause significant adverse effects on developing vegetation supporting the SWWFC;

3. (ii. Page 33) The general statement that reservoir operations are "negatively impacting flycatcher populations" is not supported by the best scientific data available with regard to Isabella Reservoir. Since 1996, comprehensive scientific data regarding riparian trees and vegetation comprising the riparian zone of the South Fork of the Kern River has been collected and reported to the Service. This scientific data demonstrates empirically that this riparian area has proven to be far more resilient and tolerant of inundation than predicted, with no documented long-term effects on the riparian habitat used by the SWWFC. Significantly, the scientists have documented that the periodic flooding of the riparian area in high flow years disperses and establishes a high density of new seedlings and enhances growth rates for mature trees. Only on a rare occasion, such as in 1995, has there been a circumstance where a limited number of nests were inundated or relocated. The majority of riparian trees and associated vegetation lost during periods of sustained inundation have consistently occurred at elevations substantially below the point where flycatchers are known to nest and breed. In fact, most SWWFC have been recorded as nesting in areas where habitat did not exist prior to 1981. More detailed comments have been provided by the Corps and have been documented in detail in the enclosed reports prepared by Jones & Stokes. The Plan should be revised to conform to the current scientific data regarding Isabella Reservoir;

4. (ii. Page 33) The Plan states that Appendices H and I provide "further discussion relating to Isabella Reservoir on the Kern River. Instead, these appendices along with Appendix illustrate a fundamental deficiency in the Plan. A careful review of these appendices uncovers that they contain virtually no reference and certainly no analysis or scientific data with regard to Isabella Reservoir. For example, Appendix J, "Fluvial Hydrology of Regulated Rivers in the Range of Southwestern Willow Flycatcher" makes no mention of the Kern River and current operation of Isabella Reservoir. In fact the appendix acknowledges that the analysis "is limited to the main stem of the Gila River, Verde River, Middle Rio Grande, and Lower Colorado River." (Page J-2) As

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confessed in the appendix, "[t]his paper concludes by using these demonstrated effects of dams [those in other states] to make specific recommendations for the recovery of the southwestern willow flycatcher population." (Page J-3 & 4.) However, this appendix contains no scientific analysis or data establishing a nexus between the sites mentioned and Isabella Dam and Reservoir. Similarly, with regard to Appendix H "Exotic Species in Riparian Ecosystems of the US Southwest" the only direct reference to the Kern River is that "flycatcher distribution appears to be unrelated to insect biomass at the native-dominated Kern River (Whitfield, et al. 1999b)". (Page H-8) Finally, Appendix I, "Implications of Water and River Management for the Southwestern Willow Flycatcher: The Fluvial, Hydrologic, and Geomorphologic Context for Recovery" contains only a single reference indicating that at "Lake Isabella on the Kern River in California" delta habitat existed at the headwaters of the lake. (Page I-9). In all three of these appendices there is citation to the literature listed in Section VI. of the Plan in an apparent effort to provide scientific support for the analysis, conclusions and recommendations stated in the appendices. However, Section VI of the Plan does not contain a single scientific report directly addressing the impacts of the operations of Isabella Reservoir on riparian trees and vegetation. All those existing reports were systematically omitted by the Service. Instead, the Plan includes only various studies reviewing brown-headed cowbird parasitism not impacts of the operation of Isabella Reservoir. All the management actions and recommendations regarding modification of current reservoir operations with regard to Isabella Reservoir are unsupported by any scientific data and therefore are arbitrary and capricious;

5. (II. Page 43) The statement that "in recent years, several of the few larger populations have been impacted by . . . inundation by impounded water (. . . Lake Isabella)" is incomplete and inaccurate. First, the statement is not supported by any reference to any scientific data which documents the direct or indirect impacts being discussed. Furthermore, a review of the entire record of scientific data regarding Isabella Reservoir indicates that any site specific adverse impacts of short duration are counter-balanced by positive impacts of increased riparian acreage and maintenance of existing habitat within the reservoir. The Plan should consider the entire record of scientific data when discussing impacts of routine reservoir operations;

6. (II. Page 52) This portion of the Plan is generally an accurate summary of the consultation history between the Service and the Corps. However, since the preparation of the 1998 report by the California Subcommittee of the Southwestern Willow Flycatcher Recovery Team, significant new information contained in detailed and comprehensive scientific reports has been analyzed with regard to the effects of Isabella Reservoir on riparian acreage within the reservoir. The 1998 Subcommittee report assumed, without the benefit of empirical data specific to Isabella Reservoir, that continued routine operations of Isabella Reservoir would cause the permanent loss of both herbaceous vegetation and riparian trees within the reservoir between the elevations of 2,580 and 2,600 amounting to a total loss of 1,100 acres. Based on that assumption the Subcommittee recommended that the entire area be considered permanently lost and unusable for SWWFC nesting and breeding. On that basis it was suggested that the entire area be replaced with alternative habitat at another location. However, the recently completed detailed scientific studies prepared by Jones & Stokes have documented that the assumption of permanent habitat loss and conclusion of unsuitability of habitat is not scientifically accurate or valid. Further, studies published both before and after the 1998 Subcommittee report have uniformly concluded that habitat was not,

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and is not, a limiting factor for SWWFC nesting and breeding. The Service should not incorporate as part of the recovery plan the assumptions, conclusions or recommendations contained in the 1998 Subcommittee report. Instead, the most currently available scientific data should be reviewed and incorporated into the Plan;

7. (IV. Pages 86-88, Table 13) The summary of the critical habitat designation history stated in the Plan is incomplete and inaccurate. On May 11, 2001 the United States Court of Appeal, 10th Circuit, invalidated and set aside the rule designating critical habitat for the SWWFC for failure to comply with the economic and other relevant impact analysis specified in ESA. New Mexico Cattle Growers Association v. United States Fish and Wildlife Service, 248 F.3d 1277 (2001).¹ Currently, the Service has failed to designate critical habitat for the SWWFC in compliance with ESA. The Plan should be revised to provide that there is no critical habitat designation in effect and therefore those sections should be deleted from the Plan. Should the Service commence new rule making procedures with regard to a proposed designation of critical habitat for the SWWFC, it will be required to fully comply with the Administrative Procedures Act and all the substantive and procedural requirements of both ESA and the National Environmental Policy Act ("NEPA"), including but not limited to the following: utilizing the best scientific data currently available, consideration of all economic impact and any other relevant impact of specifying any particular area as critical habitat, consideration of properly developed alternatives, determination of whether the benefits of excluding a specific area outweigh the benefits of inclusion, proper cooperation with State and local agencies, as required under NEPA and ESA, and other legal requirements;

8. (IV. Page 83, Table 11) The Plan provides no discussion, analysis or scientific data to support the criteria of the "minimum number of territories for reclassification" as stated in Table 11. Specifically, there is no explanation for why 75 territories has been deemed to be the threshold for reclassifying the SWWFC from endangered to threatened at Isabella Reservoir. Further, it is not clear from the Plan whether the Service is contemplating a requirement that all "management units" must meet their respective minimum numbers before reclassification can occur or whether reclassification is being proposed on unit by unit basis. A detailed explanation of this portion of the Plan is essential. Absent a scientifically supported basis for these numbers the reclassification criteria is arbitrary and capricious;

9. (IV. Pages 89-122; V. 124-136) It is unclear from the 33 pages of recovery actions, which actions are proposed to be applied with regard to Isabella Reservoir. The Service should include a clear statement in the Plan of the reasoning for recommending that a specific management action is proposed to be implemented with regard to Isabella Reservoir. Further, the Plan should be revised to state the entire cost that will be incurred with regard to implementing any specific management action at Isabella Reservoir not simply a figure estimating the expected Federal agency expenditure for the specific task. Particularly the Plan should identify the cost associated with any management action directed at modification of dam operating rules and operations (e.g., Page 98-99). In addition, the Plan needs to include an analysis, with supporting scientific data, for how each management action proposed for implementation at Isabella Reservoir

¹ Other alleged deficiencies in the prior critical habitat designation were not addressed by the Court. Id., page 1280.

Field Supervisor
Arizona Ecological Services Field Office
United States Fish and Wildlife Service
September 25, 2001
Page 9

will result in the delisting of the SWWFC according to the criteria for listing specified in ESA (16 U.S.C. 1533(a)(1)). Finally, the Plan should include an analysis, based on scientific data, documenting why it is necessary to include in the Plan management actions in addition to those specified in the Service's final biological opinion regarding routine operation of Isabella Reservoir in order to promote conservation of SWWFC and eventual delisting.

IV. CONCLUSION

Based on the above written comments, the Kern River Watermaster and those agencies, landowners and residents dependent upon the continued conservation storage of Kern River water in Isabella Reservoir, respectfully request that the Secretary and Service not approve nor implement the Plan as written and instead direct that the Plan be revised consistent with these comments.

Very truly yours,



C.H. Williams
Kern River Watermaster

CHWSKK\meh

Enclosures

cc: Congressman Calvin M. Dooley
Congressman William M. Thomas
Kern County Board of Supervisors
City of Bakersfield, City Council
Buena Vista Water Storage District
Kern County Water Agency
Kern Delta Water District
North Kern Water Storage District
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June 13, 2002

CERTIFIED MAIL -
RETURN RECEIPT REQUESTED

Field Supervisor
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United States Fish and Wildlife Service
2321 West Royal Palm Road, Suite 103
Phoenix, AZ 85021-4951

RE: INFORMAL REQUEST FOR INFORMATION PURSUANT TO THE UNITED STATES FISH AND WILDLIFE'S LETTER DATED MAY 2, 2002, REGARDING POSSIBLE RE-PROPOSING OF CRITICAL HABITAT FOR THE SOUTHWESTERN WILLOW FLYCATCHER (*Empidonax traillii extimus*)

Dear Gentlemen:

This letter is provided in response to the United States Fish & Wildlife Service's ("Service") May 2 2002 informal request for information regarding a possible re-proposal of critical habitat for the Southwestern Willow Flycatcher (*Empidonax traillii extimus*) ("Flycatcher"). The Kern River Water Master ("Watermaster") on behalf of the City of Bakersfield, North Kern Water Storage District, Kern Delta Water District, Buena Vista Water Storage District, Kern County Water Agency, and Tulare Lake Basin Water Storage District is an interested party with regard to such matters. Each of these agencies have various historic rights to use Kern River water as well as the perpetual and exclusive right to store up to 535,000 acre feet of Kern River water at any one time in the conservation storage space of Isabella Reservoir as provided in that certain contract between the United States of America and various local agencies and their successors, entitled "Contract Among The United States of America And North Kern Water Storage District, Buena Vista Water Storage District, Tulare Lake Basin Water Storage District, and Hacienda Water District", date October 23, 1964. Each of these local agencies or municipalities is dependent on the continued conservation storage of Kern River water in Isabella Reservoir for the beneficial uses of groundwater storage, replenishment and irrigation.

This information is provided to assist the Service in its effort to gather current information which is important to assessing whether to re-propose the designation of critical habitat for the Flycatcher. Specifically, this letter concerns information with regard to Isabella Reservoir, Kern County, California.

OVERVIEW

The Kern River is the southern most major river originating in California's Sierra Nevada mountain, flowing into the San Joaquin Valley. Annual April to July river runoff (standard measurement for snow melt runoff in California) indicates that flow in the Kern River fluctuates dramatically, ranging from a low of 87,400 acre-feet in 1961 to 1,545,800 million acre-feet in 1983. Because the Kern River has the potential to generate tremendous flows related to spring snow melt, and has demonstrated its ability to cause

EXHIBIT C

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devastating flood damage on the San Joaquin Valley floor and in the City of Bakersfield, such as in 1937, 1938, 1941 and 1943, the United States Congress authorized as part of the Flood Control Act of 1944, the construction of Isabella Dam and Reservoir as a United States Army Corps of Engineers ("Corps") flood control project.

The total area dependent upon the conservation of Kern River water stored in Isabella Reservoir exceeds 300,000 acres within the southern San Joaquin Valley portion of Kern County, California. (See map Exhibit 1, attached hereto and incorporated herein.) The annual water demand of the lands dependent on Kern River water to produce agricultural crops is only satisfied in years of high run-off. In years in which Kern River runoff is in excess of irrigation demand, surplus Kern River water is conserved and stored in both Isabella Reservoir and in groundwater basins beneath the San Joaquin Valley floor in Kern County in order to ensure available local supply in future years when the Kern River natural flow is inadequate. During the historic 1986-1992 California drought, local agencies and municipalities were forced to rely on reserve groundwater supplies to maintain agricultural and urban water needs. In 1991 alone the California drought caused the Central Valley portion of Kern County to suffer a 15 percent decline in water use that resulted in an abandonment of 110,000 acres of farm land from production; a \$9 million dollar expenditure in additional agricultural wells; and an estimated \$125 million dollar loss in farm income. ("Economic Impacts of the 1991 Drought on Kern County Agriculture", Northwest Economic Associates (1991).) The farmers dependent on Kern River water generate an excess of \$400 million dollars in permanent and annual crop production each year and nearly an equal amount each year in the production and marketing of goods and services by other farm related businesses in Kern County totaling nearly three-quarters of billion dollars. ("The Economic Impacts of Potential Restrictions to Irrigation Storage in Isabella Reservoir", Northwest Economic Associates (1993).) Thousands of farm and other local jobs are supported by virtue of the Kern River water stored in Isabella Reservoir. (Id.)

GENERAL COMMENTS & INFORMATION

1. The Service needs to revise and expand the list of persons and public agencies it has determined to be interested in matters relating to the Flycatcher. Specifically, notwithstanding the fact that the Watermaster has previously provided the Service with extensive prior written comments regarding the prior critical habitat designation and the recently circulated draft recovery plan; participated in several noticed public hearings; and participated as an applicant with regard to the Service's formal consultation with the Corps regarding the Flycatcher as it relates to long-term routine operation of Isabella Reservoir, the Service failed to provide the May 2, 2002 letter to the Watermaster. In the future, we request that the Watermaster, as well as all other agencies identified in this letter, be added to your list of interested persons to assure that any further communication by the Service regarding a possible re-proposal of critical habitat for the Flycatcher is timely received. Direct contact is necessary so that we can fully participate in these important matters of public policy;

2. As part of the Service's no jeopardy biological opinion dated June 14, 2000 (1-1-99-F-216) regarding Isabella Reservoir, the Corps was required as a non-discretionary term and condition to "implement or fund a habitat restoration and/or enhancement plan on . . . 1,150 acres of protected lands". The Corps in conjunction with the United States Fish & Wildlife Foundation, the Service, and other private and public agencies, is in the course of fully satisfying this term of the Final Biological Opinion. In addition the Corps continues to comply with the other terms and conditions of the opinion. Therefore, while it is

highly questionable that any lands within Isabella Reservoir could ever be properly determined to be critical habitat for the Flycatcher, these lands are already the subject of an elaborate conservation management plan through the Final Biological Opinion and therefore the need to designate this area as critical habitat is not essential nor necessary;

3. The most current and complete scientific data available regarding the Flycatcher and habitat in the vicinity of Isabella Reservoir indicate that there is no scientific basis to designate this area as critical habitat. Since 1996, comprehensive scientific data regarding riparian trees and vegetation within the Reservoir comprising a portion of the riparian zone of the South Fork of the Kern River has been collected and reported to the Service. This scientific data demonstrates empirically that this riparian area has proven to be far more resilient and tolerant of inundation than predicted, with no documented long-term effects on the riparian habitat used by the Flycatcher. In fact, the present riparian zone located within Isabella Reservoir is thriving due to current management activities and operations, e.g., the exclusion of cattle grazing, and continued routine operation of reservoir consistent with the current flood control criteria and existing contracts for conservation storage. Significantly, the scientists have documented that the periodic flooding of the riparian area in high flow years disperses and establishes a high density of new seedlings and enhances growth rates for mature trees. In sum, this scientific data indicates that habitat quantity and quality do not appear to be limiting either the size or reproductive success of Flycatcher on the South Fork. The Service should consider the best scientific and commercial data currently available with regard to the Flycatcher and Isabella Reservoir. In that regard, enclosed are several scientific reports containing the most current scientific information available with regard to Isabella Reservoir:

- a. Final Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Reservoir, California Delivery Order 0064, Environmental Services Contract No. (DACW05-95-D-0003) Task 2. Evaluation of the 1997, 1998, 1999 Effects of Isabella Dam and Lake Operations on Riparian Vegetation along the South Fork Kern River (May, 2000).
- b. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California, (Delivery Order 0044); Environmental Services Contract No. (DACW05-98-D-0020) Task 3. 1997-2001 Survey Results for Brown-headed Cowbirds in the Kern River Valley, Kern County, California (February 2002).
- c. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California, (Delivery Order 0044); Environmental Services Contract No. (DACW05-98-D-0020) Task 2. 1997-2001 Summary of Survey Results for Southwestern Willow Flycatcher and Least Bell's Vireo in the Kern River Valley, Kern County, California (February 2002).
- d. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California Delivery Order 0087, Environmental Services Contract (DACW05-98-D-0020 Task 6. Final Habitat Suitability Index Model for the Southwestern Willow Flycatcher (*Empidonax traillii* extimus) along the South Fork Kern River, Kern County, California) (February 2001)

- e. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California Delivery Order 0028 Environmental Services Contract No. (DACW05-98-D-0020) Task 7. Evaluation of the 1997, 1998 and 1999 Effects of Isabella Dam and Lake Operations on Herbaceous Vegetation Along the South Fork Kern River (June 2001).
- f. Biological Studies in Support of Endangered Species Act Compliance for Routine Operation of Isabella Dam and Lake, California Delivery Order 0028 Environmental Services Contract No. (DACW05-98-D-0020) Task 8. Evaluation of the Effects of Isabella Dam and Lake Operations on Riparian Tree Growth along the South Fork Kern River (May 2001).
- g. Vegetation Analysis of Southwestern Willow Flycatcher (*Empidonax traillii extimus*) Nest Sites 1989-1999, Final Report 2001, Mary J. Whitfield Acting Research Director, Kern River Research Center (October 2001).
- h. Southwestern Willow Flycatcher Monitoring And Removal of Brown-Headed Cowbirds on The South Fork Kern River California in 2001, Final Report, Mary J. Whitfield, Southern Sierra Research Station (January 2002).

4. On May 11, 2001 the United States Court of Appeal, 10th Circuit, invalidated and set aside the rule designating critical habitat for the Flycatcher for failure to comply with the economic and other relevant impact analysis specified in ESA. New Mexico Cattle Growers Association v. United States Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001).¹ Should the Service attempt to propose a new rule to designate critical habitat for the Flycatcher, it is required to start anew and fully comply with all the substantive and procedural requirements of ESA, including but not limited to the following: utilizing the best scientific data currently available, consideration of all economic impact and any other relevant impact of specifying any particular area as critical habitat, consideration of properly developed alternatives, determination of whether the benefits of excluding a specific area outweigh the benefits of inclusion, proper cooperation with State and local agencies as required under NEPA and ESA, and other legal requirements;

5. The Service likewise is required to fully comply with all the requirements of both the Administrative Procedures Act and the National Environmental Policy Act. Catron County v. Babbitt, 75 F.3d 1429, 1436 (10th Cir. 1996);

6. Furthermore, it is the declared policy of Congress that all Federal agencies cooperate with State and local agencies to resolve water resources issues in concert with conservation of endangered species. (16 U.S.C. 1531(c)(2)). Several local public agencies and municipalities responsible for managing Kern River water resources as well as the general public of Kern County have a vital interest in full utilization of Isabella Reservoir and resolving these water resource issues. In this instance, the Secretary should direct the Service to notice public hearings to permit further opportunity for review and comment on any proposal for designation of critical habitat which includes Isabella Reservoir;

¹ Other alleged deficiencies (e.g. failure to comply with NEPA) in the prior critical habitat designation were not addressed by the Court. Id., page 1280.

Field Supervisor
Arizona Ecological Services Field Office
United States Fish and Wildlife Service
June 13, 2002
Page 5

7. Lastly, the Watermaster requests and expressly reserves the opportunity to provide further comment and submit additional information in the event the Service proposes a new rule designating Isabella Reservoir as critical habitat for the Flycatcher.

I appreciate having the opportunity to assist the Service on this most important matter. Please do not hesitate to contact this office at your convenience should you have any questions or require additional information.

Very truly yours,


C.H. Williams
Kern River Watermaster

CHWSKK\meh
Enclosures

cc: Congressman Calvin M. Dooley
Congressman William M. Thomas
Kern County Board of Supervisors
City of Bakersfield, City Council
Buena Vista Water Storage District
Kern County Water Agency
Kern Delta Water District
North Kern Water Storage District
Tulare Lake Basin Water Storage District
Scott K. Kuney, Esq.

G-020
Rb



United States
Department of
Agriculture

Forest
Service

San Bernardino
National Forest

1824 S Commercenter Circle
San Bernardino, CA 92408
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909-383-5770 (FAX)
909-383-5616 (TTY)

File Code: 2670

Date: March 1, 2004

Steve Spangle, Field Supervisor
Arizona Ecological Services Office
US Fish and Wildlife Service,
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

Re: Designation of Critical Habitat for the Southwestern Willow Flycatcher

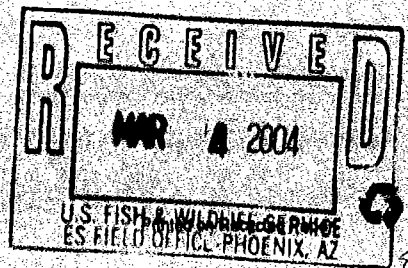
As requested by Greg Beatty, I am attaching detailed maps of habitat on the San Bernardino National Forest and immediately adjacent that has had multiple nesting pairs of Southwest willow flycatchers or nesting in multiple years. This is based on surveys conducted over the last 5 years for the Forest Service by the San Bernardino County Museum. I have marked the start and end of the stream reaches in red and attached a name that we know the area as. The only area that has not had multiple nests for multiple years is the Lower Santa Ana River that has been shown on the map with a reference to FERC relicensing. This area has recently been relicensed with an increased annual flow that will result in the formation of quality swwf habitat. It should be included in critical habitat needed for recovery as it was a primary goal of increasing the flows. These are areas on the San Bernardino, San Gabriel and San Jacinto Mountains where our management is substantially driven by Southwest willow flycatchers and should be designated as critical habitat.

LD21

If you have any questions, please call me at 909-382-2724.

Thank you for your consideration.

Steve Loe
Steve Loe
Forest Biologist



Caring for the Land and Serving People



United States
Department of
Agriculture

Forest
Service

San Bernardino
National Forest

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File Code: 2670

Date: March 1, 2004

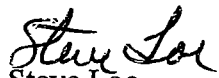
Steve Spangle, Field Supervisor
Arizona Ecological Services Office
US Fish and Wildlife Service,
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021

Re: Designation of Critical Habitat for the Southwestern Willow Flycatcher

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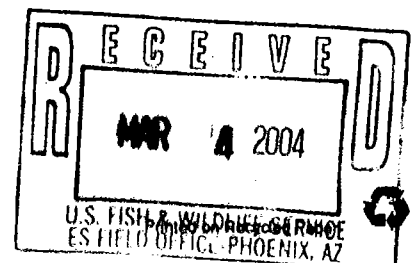
If you have any questions, please call me at 909-382-2724.

Thank you for your consideration.


Steve Loe
Forest Biologist



Caring for the Land and Serving People





REPLY TO
ATTENTION OF:

DEPARTMENT OF THE ARMY
SOUTH PACIFIC DIVISION, CORPS OF ENGINEERS

333 Market Street, Room 923
San Francisco, California 94105-2195

Regulatory Program
Office

MAR 5 2004

Steven L. Spangle, Field Supervisor
U.S. Fish & Wildlife Service
Arizona Ecological Services Field Office
2321 West Royal Palm Road, Suite 103
Phoenix, Arizona 85021-4951

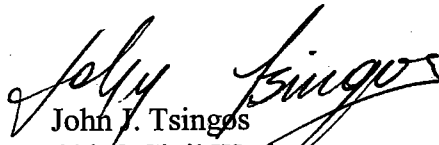
Dear Mr. Spangle:

In further response to the Notice of Intent to prepare an environmental assessment (EA) for the proposed designation of critical habitat for the endangered Southwestern Willow Flycatcher (*Empidonax traillii extimus*), published by the U.S. Fish & Wildlife Service (FWS) on January 21, 2004 (69 FR 2940), we provide comments as requested (attached), in addition to the preliminary comments provided in our letter of February 17, 2004.

We look forward to continuing our proactive working relationship with the FWS in the preparation of this EA, and fulfilling our cooperating agency responsibilities in accordance with 40 CFR Part 1501.6 and 33 CFR Parts 230.16(b) and 325, Appendix B (NEPA Implementation Procedures for the Regulatory Program).

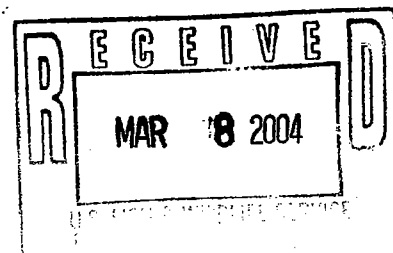
Mr. Wade L. Eakle, Ecologist & Regulatory Program Manager for the South Pacific Division, will continue to closely coordinate with all interested elements in SPD and our districts. He can be reached at (415) 977-8030, and by e-mail at Wade.L.Eakle@spd02.usace.army.mil.

Sincerely,


John Y. Tsingos
Chief, Civil Works
Integration Division

Copies furnished:

CESPA-DE
CESPK-DE
CESPL-DE



**U.S. Army Corps of Engineers
South Pacific Division**

**Additional Comments to Notice of Scoping Meetings and Intent to Prepare an
Environmental Assessment for the Proposed Designation of Critical Habitat for the
Southwestern Willow Flycatcher (69 FR 2940, January 21, 2004).**

Albuquerque District

No additional comments.

Los Angeles District

California – Southwestern Willow Flycatchers have been observed at Prado Dam in the Santa Ana River Drainage Basin. However, this area is already designated critical habitat for the endangered Least Bell's Vireo (*Vireo bellii pusillus*). Willow Flycatchers, subspecies undocumented, were observed briefly at Hansen and Santa Fe dams in the Los Angeles County Drainage Area in May and early-June 2003.

L022
W23
PR68
CH31

Sacramento District

California – We are still consolidating Southwestern Willow Flycatcher information (previously provided to the FWS Sacramento Field Office), and will provide a comprehensive list of references of work completed along the South Fork Kern River for routine and long-term operations and maintenance of Isabella Lake and Dam. Also, recently completed work (September 2003) evaluating the effects of inundation on riparian vegetation at Lake Isabella, including recent mapping of riparian vegetation along the South Fork Kern River, will be provided shortly for your consideration.

L018
W23
CH13

Regulatory Program

As mentioned in our letter of February 17, 2004, areas proposed for critical habitat designation will likely overlap existing Federal jurisdiction in waters of the United States under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899. This could lead to increased consultations, informal and formal, under Section 7 of the Endangered Species Act of 1973 (ESA), as amended, and increased workload for our Regulatory Project Managers when proposed activities regulated by the Corps of Engineers occur in designated critical habitat. An increased ESA consultation workload will likely result in extended timeframes for reaching permit decisions for the regulated public. Therefore, it will be critical to develop truly streamlined consultation procedures following the concepts and intent of the Southwest

PR60
PR61

Strategy "Long-term Strategy for Streamlining Consultations under the Endangered Species Act in Arizona and New Mexico" published in November 1999. PRE

In the arid Southwest, exotic invasive plants such as Salt Cedar or Tamarisk (*Tamarix chinensis*) and Russian Olive (*Elaeagnus angustifolia*) are commonly found in desert washes and frequently used by Southwestern Willow Flycatchers as nesting and foraging habitat. Tamarisk in the Southwest has caused severe ecological damage, habitat loss, and economic problems for public and private land and water managers. For Corps of Engineers authorized activities in waters of the United States, we frequently require permittees to mitigate the unavoidable adverse effects of their projects on the aquatic environment by replanting in-kind, on-site with native species. The implications of critical habitat designation on exotic invasive species management, control, and eradication in the Southwest need to be fully evaluated. R29

Designating critical habitat will hopefully result in larger, viable Southwestern Willow Flycatcher populations. However, catastrophic events, in which the outcome could be detrimentally magnified where metapopulations are large and more stable, need to be considered. HEL

The effects of critical habitat designation on existing agricultural practices, such as irrigation and grazing, need to be fully considered.

Finally, the importance of corridors between isolated populations needs to be considered, as well as potential habitat that is not currently considered suitable, but may be essential for flycatcher recovery. HEL